Supreme Court, U.S.
FILED
No. 961059 JAN 2 1997
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1996

SYCUAN BAND OF MISSION INDIANS;
MORONGO BAND OF MISSION INDIANS;
SANTA ROSA BAND OF TACHI INDIANS;
CACHIL DEHE BAND OF WINTUN INDIANS
OF THE COLUSA INDIAN COMMUNITY;
SOBOBA BAND OF MISSION INDIANS;
ROBINSON BAND OF POMO INDIANS,

*Petitioners,*

v.

PETE WILSON, Governor of the State of California; and the State of California,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

GEORGE FORMAN*
PATRICIA A. PROCHASKA
*Counsel of Record
FORMAN & PROCHASKA
Attorneys at Law
4340 Redwood Highway,
Suite F228
San Rafael, CA 94903
(415) 491-2310

*Attorneys for Petitioners*

December 30, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED FOR REVIEW

1. Did the Indian Gaming Regulatory Act of 1988, 25 U.S.C.A. §2701, *et seq.*, codify the "public policy" test of *California v. Cabazon*, 480 U.S. 202 (1987), to determine the scope of Class III Tribal gaming that may be authorized on Indian lands, as was held by the Second Circuit in *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir., 1990), *cert. den.*, 499 U.S. 975 (1991), or does that Act restrict Tribes to only those specific Class III games affirmatively authorized by the State in which such gaming is to be conducted, as was held by the Ninth Circuit below?

2. Does the phrase, " . . . permits such gaming for any purpose by any person, organization, or entity" as used in 25 U.S.C.A. §2710(d)(1)(B), restrict Class III gaming on Indian lands solely to those specific Class III games that State law affirmatively authorizes others to conduct, or does it authorize other forms of Class III gaming on Indian lands that a State does not criminally prohibit as a matter of public policy?

## PARTIES

In addition to the parties named in the caption, the following also are parties:

Rumsey Rancheria of Wintun Indians; Table Mountain Rancheria; Cher-Ae Heights Indian Community of the Trinidad Rancheria; San Manuel Band of Mission Indians; Viejas Reservation of the Capitan Grande Band of Diegueno Mission Indians; Hopland Band of Pomo Indians; Cabazon Band of Mission Indians; Santa Ynez Band of Chumash Mission Indians; Agua Caliente Band of Cahuilla Indians; Barona Group of the Capitan Grande Band of Mission Indians.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

PARTIES ..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS AND ORDERS BELOW ..... 1

BASIS FOR JURISDICTION ..... 1

STATUTES INVOLVED ..... 4

STATEMENT OF THE CASE ..... 4

A. Proceedings Below ..... 4

REASONS FOR ALLOWANCE OF THE WRIT ..... 9

I. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON AN ISSUE OF VITAL IMPORTANCE TO THE ECONOMIC SURVIVAL OF INDIAN TRIBES ..... 9

II. THIS CASE PRESENTS A UNIQUE OPPORTUNITY TO RESOLVE THE QUESTION WHETHER THE SCOPE OF CLASS III GAMING ON INDIAN LANDS IS TO BE DEFINED BY THE STATE'S PUBLIC POLICY TOWARD SUCH GAMING, OR LIMITED TO THE SPECIFIC CLASS III GAMES AND RULES THAT STATE LAW AFFIRMATIVELY AUTHORIZES OTHERS TO CONDUCT ..... 24

CONCLUSION ..... 26

# TABLE OF AUTHORITIES

Page

CASES

*Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427 (1932) ..... 21

*Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994) ..... 10, 13

*California v. Cabazon*, 480 U.S. 202 (1987) ..... *passim*

*Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993) ..... 17, 18, 19

*Coeur D'Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995) ..... 10

*Crow Tribe of Indians v. Racicot*, 87 F.3d 1039 (9th Cir. 1996) ..... 10

*Lac du Flambeau Band of Indians v. Wisconsin*, 743 F.Supp. 645 (W.D. Wisc. 1990), *appeal dismissed*, 907 F.2d 515 (7th Cir. 1992) ..... 13

*Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), *cert. den.*, 499 U.S. 975 (1991) ..... *passim*

*Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976) ..... 12, 21

*Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994) ..... 15, 17

*Rumsey v. Wilson*, 64 F.3d 1250 (9th Cir. 1995) ..... 2, 9, 13, 20, 24, 25

*Seminole Tribe of Florida v. State of Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996) ..... 3, 10, 11, 25

*South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986) ..... 12

TABLE OF AUTHORITIES – Continued

Page

*Spokane Tribe of Indians v. Washington State*, 28 F.3d 991 (9th Cir. 1994) ..... 10

*Spokane Indian Tribe v. U.S.*, 972 F.2d 1090 (9th Cir. 1992) ..... 10

*Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) ..... 10

*U.S. v. E.C. Investments, Inc.*, 77 F.3d 327 (9th Cir. 1996) ..... 10

*U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990) ..... 8, 17, 19, 22

*Western Telcon, et al., v. Calif. State Lottery*, 43 Cal.App.4th 114 (1995) ..... 2

*Western Telcon, et al., v. Calif. State Lottery*, 13 Cal. 4th 475 (1996), 53 Cal.Rptr.2d 812 ..... 3, 6

*Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (5th Cir. 1994) ..... 16

CONSTITUTION, STATUTES, REGULATIONS AND COURT RULES

U.S. Const. art. I, §8, cl. 3 ..... 21

U.S. Const. amend. XI ..... 3, 5, 11

18 U.S.C.A. §1166(c)(2) ..... 24

25 U.S.C.A. §1300g-6 ..... 17

25 U.S.C.A. §2701(5) ..... 4, 7, 12, 15

25 U.S.C.A. §2703(7)(A)(ii) ..... 18

25 U.S.C.A. §2703(7)(C) ..... 19

25 U.S.C.A. §2710(b)(1)(A) ..... 4, 7, 8, 11, 12, 13

TABLE OF AUTHORITIES – Continued

Page

25 U.S.C.A. §2710(d)(1)(B) ..... *passim*

25 U.S.C.A. §2710(d)(3)(A) ..... 15

25 U.S.C.A. §2710(d)(7)(B)(vii) ..... 23, 25

28 U.S.C.A. §1254(1) ..... 1

28 U.S.C.A. §1291 ..... 8

28 U.S.C.A. §1362 ..... 5

28 U.S.C.A. §2101(c) ..... 1

F.R.Civ.P. 12(b)(1) ..... 5

Cal. Gov't Code §8880, et seq. ..... 2

Cal. Penal Code §330(b)(2) ..... 6

Cal. Penal Code §330c ..... 9

4 Cal. Admin. Code, Div. 4, Art. 18, Sec. 1960 ..... 6

TREATISES AND OTHER AUTHORITIES

*Report to the Secretary of the Interior on Compliance with the Indian Gaming Act*, National Indian Gaming Commission, November, 1996 ..... 11

S. Rep. No. 446, 100th Cong., 2d Sess., 1988 U.S.C.C.A.N. 3076 ..... 7, 12

Webster's New Collegiate Dictionary, G. & C. Merrian Co., 1977 ed. ..... 13

## OPINIONS AND ORDERS BELOW

The district court's July 20, 1993 Amended Order on Cross Motions for Summary Judgment is not reported in the Official Reports, but is reported at, *inter alia*, 1993 WL 360652. The district court's judgment was entered on July 29, 1993.

The Ninth Circuit Court of Appeals' November 15, 1994 Opinion is reported at 41 F.3d 421.

The Ninth Circuit Court of Appeals' August 11, 1995 Order, Dissent, Concurrence and Amended Opinion is reported at 64 F.3d 1250.

The Ninth Circuit Court of Appeals' October 29, 1996 Order further amending the November 15, 1994 Opinion, as amended August 11, 1995, and denying the petition for rehearing, is reported at 99 F.3d 321.

Copies of the district court's July 20, 1993 Amended Order, the Ninth Circuit Court of Appeals' August 11, 1995 Order, Dissent, Concurrence and Amended Opinion and the Ninth Circuit Court of Appeals' October 29, 1996 Order are reproduced in the Appendix hereto.

## BASIS FOR JURISDICTION

The Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C.A. §§1254(1) and 2101(c) in that this Petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit, and is filed within ninety days of entry of said judgment. As can be seen from the following chronology, the procedural history of this case in the Court of Appeals is somewhat complex.

A. The Opinion of the Court of Appeals sought to be reviewed originally was filed on November 15, 1994, followed by timely petitions for rehearing and suggestions for rehearing en banc.

B. On August 11, 1995, the Court of Appeals filed an order amending its November 15, 1994 Opinion, rejecting the suggestions for rehearing en banc and denying the petitions for rehearing, with four Circuit Judges dissenting. On August 15, 1995, Petitioners herein filed a motion to stay issuance of mandate pending the filing of a petition for a writ of certiorari.

C. On August 21, 1995, the Court of Appeals issued an order instructing the parties to file supplemental letter briefs addressing the relevance of a California intermediate appellate court decision in *Western Telcon, et al., v. Calif. State Lottery*, 43 Cal.App.4th 114 (1995), subsequently reversed by the California Supreme Court in *Western Telcon, et al., v. Calif. State Lottery*, 13 Cal. 4th 475 (1996), 53 Cal.Rptr.2d 812 ("*Western Telcon*"),[1] deferring action on Petitioners' motion to stay issuance of mandate

---

[1] The issue in *Western Telcon* was the lawfulness of the California State Lottery's ("CSL") computerized, on-line keno game. The parties and the Court of Appeals in this case anticipated that the California Supreme Court's decision might resolve the "limited question" that the Court of Appeals posed for remand to the district court; *i.e.*, " . . . whether California permits the operation of slot machines in the form of the state lottery or otherwise." *Rumsey v. Wilson*, 64 F.3d at 1260. The California Supreme Court neither reached nor resolved that question. Rather, it held that the CSL's keno game was not lawful because the game was a "banking" game, rather than a "lottery" that the CSL was authorized to operate under the State Lottery Act, Calif. Govt. Code §8880, *et seq.*

and staying issuance of mandate pending further order of the Court.

D. On October 16, 1995, the Court of Appeals ordered issuance of mandate stayed pending the California Supreme Court's disposition of *Western Telcon.*

E. On December 5, 1995, the Court of Appeals filed an order construing the parties' letter briefs filed on August 28, 1995 as renewed petitions for rehearing, deferring disposition of the petitions pending the California Supreme Court's disposition of *Western Telcon* on the merits, and instructing the parties to file letter briefs on the relevance of the California Supreme Court's decision on the merits in *Western Telcon* within thirty days after issuance of the decision in that case.

F. Following the California Supreme Court's issuance of its decision in *Western Telcon v. Calif. State Lottery, supra,* the parties filed supplemental briefs as ordered by the Court of Appeals. On April 4, 1996, the Court of Appeals requested the parties to file supplemental briefs addressing the impact on this action, if any, of the Supreme Court's decision in *Seminole Tribe of Florida v. State of Florida,* ___ U.S. ___, 116 S.Ct. 1114 (1996) (hereinafter *"Seminole"*).

G. On October 29, 1996, the Court of Appeals filed an Order leaving its August 11, 1995 Opinion unchanged, but adding a footnote explaining that,

> "Since the State agreed not to 'plead the Eleventh Amendment as a jurisdictional bar to the instant action,' the Supreme Court's decision in *Seminole Tribe of Florida v. Florida,* ___ U.S. ___,

116 S.Ct. 1114 (1996), has no effect on our jurisdiction over this appeal. [Cit. Om.]"

The Court of Appeals proceeded to deny the renewed petition for rehearing and ordered that mandate issue in the normal course. On November 29, 1996, the Court of Appeals filed an order staying the issuance of mandate for thirty days, pending application for a writ of certiorari.

## STATUTES INVOLVED

25 U.S.C.A. §2701(5)

25 U.S.C.A. §2710(b)(1)(A)

25 U.S.C.A. §2710(d)(1)(B)

Copies of these statutes are set forth in the Appendix.

## STATEMENT OF THE CASE

### A. Proceedings Below.

This case arose out of negotiations between a group of recognized California Indian Tribes ("Tribes")[2] and the

[2] The Tribal participants in the negotiations and this litigation included petitioners Sycuan Band of Mission Indians, Morongo Band of Mission Indians, Soboba Band of Mission Indians, Santa Rosa Rancheria of Tachi Indians, Robinson Band of Pomo Indians and Cachil Dehe Band of Wintun Indians of the Colusa Indian Community, as well as the Rumsey Rancheria of Wintun Indians, Table Mountain Rancheria, Cher-Ae Heights

State of California ("State") for Tribal-State compacts to authorize the conduct of Class III gaming activity on the respective Tribes' Indian lands pursuant to the Indian Gaming Regulatory Act of 1988, 25 U.S.C.A. §2710, *et seq.* ("IGRA"). When the Tribes and the State could not agree on the scope of Class III gaming that the State "permits" within the meaning of 25 U.S.C. §2710(d)(1)(B), the State and the Tribes executed an "Agreement for Submission of Class III Tribal-State Compact Dispute to United States District Court" ("Litigation Agreement"). In the Agreement, the State expressly consented to the filing of the Tribes' suit for declaratory judgment on the question whether the State permits certain forms of Class III gaming,[3] and that the State would not make a motion to dismiss under F.R.Civ.P. 12(b)(1) or otherwise plead the Eleventh Amendment to the Constitution as a jurisdictional bar to the action.

Pursuant to the Agreement, the Tribes filed four separate lawsuits in the United States District Court for the Eastern District of California. The Tribes invoked the district court's jurisdiction under 28 U.S.C.A. §1362.

---

Indian Community of the Trinidad Rancheria, San Manuel Band of Mission Indians, Viejas Reservation of the Capitan Grande Band of Diegueno Mission Indians, Hopland Band of Pomo Indians, Cabazon Band of Mission Indians, Santa Ynez Band of Chumash Mission Indians, Agua Caliente Band of Cahuilla Indians, and Barona Group of the Capitan Grande Band of Mission Indians.

[3] These included percentage and house-banked card games, and various categories of electronic, computerized or electromechanical gambling machines.

The suits were consolidated for disposition, and on cross-motions for summary judgment, the district court determined that the California Lottery Act,

> . . . authorized the State Lottery to operate electronic games virtually identical to the electronic games requested by the Tribes.[Fn. Om.] Moreover, from the record, it appears that equipment similar, if not identical, to that proposed by the Tribes is currently employed by the State in its electronic gaming operations. Given the express purposes and intent of IGRA to facilitate Indian revenue generation and governmental autonomy, the Tribes should not be deprived of the opportunity to enhance their gaming operation and revenues in the same manner, and with the same modern equipment, that the State has used to enhance its operations.

Slip Opinion, at 18.[4]

---

[4] The district court assumed – but did not decide – that the electronic devices at issue constitute "slot machines" as that term is broadly defined in Calif. Pen. Code §330(b)(2). Under *Western Telcon*, the State Lottery cannot use such devices to conduct banking games; however, the State Lottery's lottery games by definition are percentage games in that the State Lottery is allowed to retain a percentage of the amounts wagered. Moreover, California law clearly authorizes other entities to conduct percentage games (through parimutuel wagering on horse races), and possibly even "house-banked" gambling under some circumstances (*see, e.g.*, 4 Calif. Admin. Code, Div. 4, Art. 18, §1960). Therefore, nothing in *Western Telcon* detracts from the correctness of the district court's conclusion that the Tribes are entitled to negotiate compacts that allow them to use the electronic equipment described in the Tribes' complaints to conduct lottery games.

The district court determined that some of the forms of Class III gaming requested by the Tribes (house-banked and percentage card games) were not expressly authorized by State law. As to those, the district court held that the Tribes were entitled to negotiate only for those forms of Class III gaming that the State does not, as a matter of public policy, criminally prohibit, because Congress intended that the scope of Class III gaming that the State "permits" for the purposes of IGRA be determined in accordance with the "public policy" test, *California v. Cabazon*, 480 U.S. 202 (1987), *Id.*, at 19.

The district court relied upon several sources to support its conclusion that "permits such gaming" should be interpreted according to *California v. Cabazon's* public policy test in both 25 U.S.C.A. §2710(b)(1)(A) and 25 U.S.C.A. §2710(d)(1)(B): the text of 25 U.S.C.A. §2701(5) incorporates *California v. Cabazon's* public policy test without distinguishing between Class II and Class III gaming; IGRA uses identical language ("permits such gaming") to erect a mandatory precondition to both Class II and Class III gaming on Indian lands; the Senate Report[5] accompanying IGRA's passage clearly expressed the intent of Congress that Tribes should be able to maximize revenues from both Class II and Class III gaming to support their governments and governmental programs without undue subjugation to State law; and the Second

---

[5] S. Rep. No. 446, 100th Cong., 2d Sess., 1988 U.S.C.C.A.N. 3076.

and Eighth Circuits already had applied *California v. Cabazon*'s public policy test to determine the permissible scope of Class III gaming.[6]

The district court found that California's public policy is to criminally prohibit, "Banking or percentage card games using traditional casino game themes[,]" *id.*, at 23, and thus that the Tribes were not entitled to negotiate about such games, but that Tribal-State differences over other kinds of banking and percentage card games should be resolved through the compacting process. *Id.*, at 24.

The State timely appealed from the district court's judgment pursuant to 28 U.S.C. §1291, and the Tribes timely cross-appealed from the portion of the district court's judgment pertaining to banking and percentage card games using traditional casino themes.

On appeal, the Court of Appeals recognized that *California v. Cabazon*'s public policy test applies in determining whether a State "permits" Class II gaming for the purposes of 25 U.S.C.A. §2710(b)(1)(A), but held that the State's public policy does not define the scope of Class III gaming that a State "permits" for the purposes of 25 U.S.C.A §2710(d)(1)(B). Rather, despite the use of identical language in both sections of IGRA, the Court of Appeals interpreted "permits" as used in 25 U.S.C.A. §2710(d)(1)(B) as meaning that " . . . a state need only allow Indian tribes to operate games that others can

---

[6] *Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024 (2d Cir. 1990); *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990).

operate, but need not give tribes what others cannot have." *Rumsey v. Wilson, supra,* 64 F.3d at 1258.

Based upon its inconsistent construction of the meaning of "permits," and explicitly rejecting the Second Circuit's construction of the same language in *Mashantucket Pequot,* the Court of Appeals reversed the district court's judgment concerning the Tribes' proposals for electronic games and banked or percentage card games not using traditional casino themes, and remanded the case to the district court "to consider the limited question of whether California permits the operation of slot machines in the form of the state lottery or otherwise." *Rumsey v. Wilson, supra,* 64 F.3d at 1260.[7]

## REASONS FOR ALLOWANCE OF THE WRIT

### I. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON AN ISSUE OF VITAL IMPORTANCE TO THE ECONOMIC SURVIVAL OF INDIAN TRIBES.

Following (and in response to) this Court's 1987 decision in *California v. Cabazon, supra,* holding that

[7] Because the district court determined that the State affirmatively authorizes the State Lottery to use the electronic/computer/video equipment described in the Tribes' Complaints, neither the district court nor the Court of Appeals reached the question whether California allows the operation of a slot machine in the form of the state lottery, or in the form of punchboards, which Calif. Penal Code §330c includes within the definition of "slot machine" and which the State Lottery sells by the millions throughout the State.

California's gambling laws generally do not apply to Indian country in that State, Congress passed the Indian Gaming Regulatory Act of 1988, 25 U.S.C.A. §2701, *et seq.* ("IGRA"), in order to provide a statutory basis for the operation and regulation of gaming by Indian Tribes. *Seminole, supra,* 116 S.Ct. at 1119 (1996). Fostered by IGRA, Tribal government gaming has emerged as the most successful program of Reservation economic development in the history of federal Indian policy – at least for those Tribes that have been able to avail themselves of a broad spectrum of Class III gaming activities.

Since 1988, there has been extensive litigation involving Tribes, States and the United States over the meaning and effect of IGRA, particularly those portions of IGRA involving the definition and permissible scope of Class III gaming. In the Ninth Circuit alone, IGRA's Class III gaming provisions have been the subject of seven appellate decisions in addition to this action;[8] nationally, every federal Circuit except the Third and Fourth Circuits has decided some of the more than 40 other federal cases in which some aspect of IGRA's Class III gaming provisions have been a central issue.

Despite eight years of intense litigation in the lower courts, and despite the importance of Tribal government

---

[8] *Crow Tribe of Indians v. Racicot,* 87 F.3d 1039 (9th Cir. 1996); *U.S. v. E.C. Investments, Inc.,* 77 F.3d 327 (9th Cir. 1996); *Coeur D'Alene Tribe v. State of Idaho,* 51 F.3d 876 (9th Cir., 1995); *Cabazon Band of Mission Indians v. Wilson,* 37 F.3d 430 (9th Cir., 1994); *Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535 (9th Cir., 1994); *Spokane Tribe of Indians v. Washington State,* 28 F.3d 991 (9th Cir. 1994); *Spokane Indian Tribe v. U.S.,* 972 F.2d 1090 (9th Cir. 1992).

gaming for Reservations communities, this Court has heard only one case – *Seminole* – involving IGRA, and the core question of the permissible scope of Class III gaming on Indian lands remains the subject of a split among the Circuits. In *Seminole, supra*, this Court held that the plenary power of Congress over commerce with the Indian Tribes does not extend to abrogating State sovereign immunity under the Eleventh Amendment to the Constitution, and thus that a Tribe cannot invoke IGRA's judicial remedies against an unconsenting State.

The basis upon which this Court decided *Seminole* necessarily left undecided the narrow – but critical – question of statutory interpretation posed in this case: whether the phrase " . . . permits such gaming for any purpose by any person or entity," as used in both 25 U.S.C.A. §2710(b)(1)(A) and 25 U.S.C.A. §2710(d)(1)(B) has the same meaning in both sections, and thus applies *California v. Cabazon's* public policy test to determine both whether Class II and Class III gaming activities may be authorized and conducted on a Tribe's Indian lands.

This question is of enormous significance to federally-recognized Indian Tribes throughout the United States, but especially to the 145 Tribes in the largely rural areas of the Eighth, Ninth and Tenth Judicial Circuits[9]

---

[9] According to the National Indian Gaming Commission's November, 1996 *Report to the Secretary of the Interior on Compliance with the Indian Gaming Regulatory Act*, Tribal governmental gaming facilities of various kinds are operated on the lands of 27 Tribes within the Eighth Circuit, 89 Tribes within the Ninth Circuit and 29 Tribes within the Tenth Circuit. Within the Second, Fifth and Eleventh Circuits, gaming facilities are operated on the lands of a total of at least eight Tribes.

that have encountered varying degrees of State resistance to their efforts to utilize Class III Tribal governmental gaming to fulfill IGRA's dual objectives of enhancing Tribal economic self-sufficiency and the capacity of Tribal governments to provide critically-needed governmental services to their communities.

Petitioners contended below that, consistent with the plain language of 25 U.S.C.A. §2701(5),[10] the stated intent of Congress[11] that the lawfulness of gambling on Indian lands should be determined in accordance with *California v. Cabazon's* "public policy" test, and the "eminently sound and vital" canon of statutory construction that ambiguities in a statute enacted for the benefit Indians should be liberally construed in favor of the Indians,[12] the phrase "permits such gaming" as used in 25 U.S.C.A. §2710(d)(1)(B) means exactly the same thing as the identical phrase in 25 U.S.C.A. §2710(b)(1)(A) means; *i.e.*, that the particular class of gaming activity must be conducted on lands located in a State that does not, as a matter of public policy, criminally prohibit that class of gaming activity.

---

[10] "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."

[11] *See, e.g.*, S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3071, 3076, 3082.

[12] *See, e.g., Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 656 (1976); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

Although Webster's *New Collegiate Dictionary* defines "ambiguous" as "capable of being understood in two or more senses[,]" the Court of Appeals in this case purported to "find that the plain meaning of the word 'permit' to be unambiguous," and thus that, "we need not look to IGRA's legislative history." *Rumsey v. Wilson*, 64 F.3d at 1258. Quoting Black's Law Dictionary (which includes "doubleness of meaning" in the definition of "ambiguity"), the Court of Appeals defined "permit" to mean, "[t]o suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act."[13]

Acknowledging that the word "permit" as used in 25 U.S.C.A. §2710(b)(1)(A) means that a Tribe may authorize or operate Class II gaming on its lands if the state in which the gaming is to be conducted does not criminally prohibit Class II activity as a matter of public policy, the Court of Appeals nonetheless held that the word "permit" as used in 25 U.S.C.A. §2710(d)(1)(B) means that, "a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." *Rumsey v. Wilson, supra*, 64 F.3d at 1258.

Four federal appellate Circuits (the Second, Eighth, Ninth and Tenth) have directly ruled on the question whether IGRA incorporated *Cabazon's* public policy test to determine the meaning of "permits such gaming" as that phrase is used in IGRA to define the scope of Class

---

[13] The same dictionary definition led to a contrary conclusion in *Lac du Flambeau Band of Indians v. Wisconsin*, 743 F.Supp. 645 (W.D. Wisc., 1990), *appeal dismissed*, 907 F.2d 515 (7th Cir. 1992).

III gaming that Tribes are entitled to request be included in Tribal-State compacts. The decision of the Court of Appeals in this case is consistent with the decision of one Eighth Circuit panel, but inconsistent with the earlier decision of another Eighth Circuit panel. The decision of the Court of Appeals in this case is inconsistent with decisions of the Second and Tenth Circuits. One Circuit (the Seventh), dismissed an appeal from a district court judgment with which the decision of the Court of Appeals in this case is inconsistent, and one Circuit (the Fifth) has implied that it would have reached a result contrary to that in this case if it were to squarely address the issue.

The Second Circuit's decision in *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2d Cir. 1990), is the leading Court of Appeals decision standing for the proposition that "permits such gaming" as that phrase is used in 25 U.S.C.A. §2710(d)(1)(B) is to be interpreted in accordance with *California v. Cabazon*'s public policy test. In that case, the Court of Appeals exhaustively analyzed both the plain language and legislative history of IGRA,[14] and determined based on that analysis that *California v. Cabazon*'s public policy test is as applicable to determining the permissible scope of Class III gaming as it is to Class II:

---

[14] "We deem this legislative history instructive with respect to the meaning of the identical language in §2701(d)(1)(B), regarding class III gaming, which we must interpret." *Id.*, at 1030.

> The State's position, furthermore, is in direct opposition to the central premise of the IGRA with respect to class III gaming.
>
> * * *
>
> The compact process is therefore to be invoked unless, applying the Cabazon test, it is determined that the state, "as a matter of criminal law and public policy, prohibit[s] [class III] gaming activity." §2701(5). Absent such a conflict, the interests of the tribe and state are to be reconciled through the negotiation of a compact . . .
>
> * * *
>
> Under the State's approach, on the contrary, even where a state does not prohibit class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming. [Fn. Om.] The compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.

*Id.*, at 1030-1031.

The Tenth Circuit, in *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), accepted both the reasoning and result of the Second Circuit's analysis in *Mashantucket Pequot*:

> In essence, the states' duty under §2710(d)(3)(A) to negotiate with the Indian tribe

> in good faith is nothing more than a requirement that the states make a good faith attempt to craft a voluntary agreement with the Indian tribe pertaining to Class III gaming on Indian land that is consistent with state policy.
>
> * * *
>
> If a state has a policy prohibiting all Class III gaming, then Indian Class III gaming is also automatically prohibited. 25 U.S.C. §2710(d)(1)(B). If it has any other less restrictive policy or preference regarding Class III gaming in particular, or Class III gaming on Indian lands specifically, nothing in IGRA requires the state to surrender or compromise those policies or preferences in attempting to negotiate a compact with the Indian tribe. Of course, the federal government may ultimately override state policy by regulation [fn. om.] imposed by the Secretary of the Interior, but that action would not implicate the Tenth Amendment.

*Id.*, at 1434.

In *Lac du Flambeau Band of Indians v. Wisconsin, supra,* the district court conducted the same kind of analysis of state law as this Court conducted in *California v. Cabazon,* concluded that Wisconsin's public policy is to regulate, rather than prohibit, Class III gaming, and on that basis held that the State was obligated to negotiate a compact allowing the Tribe to conduct a much broader spectrum of Class III gaming activities than the State affirmatively authorized others to conduct. The State's appeal from that decision was dismissed by the Court of Appeals.

The Fifth Circuit, in *Ysleta del Sur Pueblo v. State of Texas,* 36 F.3d 1325, 1334 (5th Cir. 1994), concluded that

§107 of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, 25 U.S.C.A. §1300g-6, "clearly does not incorporate Cabazon Band," and thereby was able to "leave open the question of whether IGRA incorporates Cabazon Band with regard to Class III gaming." *Id.* However, the observation by the Court of Appeals that its conclusion was buttressed by the fact that the Restoration Act makes no reference to *Cabazon*, while IGRA does, and that, "We take IGRA's reference to Cabazon Band as evidence that Congress knew how to incorporate the case when it so intended[,]" *id.*, at n. 18, suggests that the Court of Appeals would have agreed with the Second and Tenth Circuits if it had been called upon to actually decide the question.

Contrary to the decisions of the Second and Tenth Circuits in, respectively, *Mashantucket* and *Ponca*, and to the decision of another Eighth Circuit panel in *United States v. Sisseton-Wahpeton Sioux Tribe, supra*, 897 F.2d at 366, n. 10,[15] an Eighth Circuit panel, in *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993), rejected application of *California v. Cabazon*'s public policy test to the determination of the scope of Class III gaming for which Tribes are entitled to negotiate compacts. Unlike the Second Circuit's decision in *Mashantucket*, however, the Eighth Circuit's cursory and conclusory decision was unsupported by any analysis or citation of authority. Indeed, the panel's entire discussion of the issue consisted of a single paragraph:

---

[15] "Even if a tribe engages in class III gaming pursuant to a compact with the State, it does not necessarily follow that the tribe is subject to the entire body of State law on gaming."

> We agree with the state that it need not negotiate traditional keno if only video keno is permitted in South Dakota. The "such gaming" language of 25 U.S.C. §2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit. Because video keno and traditional keno are not the same and video keno is the only form of keno allowed under state law, it would be illegal, in addition to being unfair to the other tribes, for the tribe to offer traditional keno to its patrons. Therefore, we agree with the district court that the state did not refuse to negotiate in good faith on the tribe's operation of traditional keno.

3 F.3d at 279. The Eighth Circuit not only held that the State need not negotiate about traditional keno, but also that the State need not negotiate with a Tribe about converting a concededly lawful Class II card game into Class III activity by offering wager limits higher than allowed by State law.[16]

The Ninth Circuit panel in this case recognized that its interpretation of "permits such gaming" conflicts with that of the Second Circuit in *Mashantucket Pequot*, but preferred to follow the lead of the Eighth Circuit in *Cheyenne River Tribe, supra*. The six Ninth Circuit Judges

---

[16] Under 25 U.S.C.A. §2703(7)(A)(ii), Class II gaming includes card games that are either explicitly authorized or not explicitly prohibited by the laws of the State (and played at any location in the State), but only if played in conformity with State laws or regulations (if any) regarding operating hours or limits on wagers or pot sizes.

who would have granted rehearing *en banc* in this case disagreed with their panel brethren:

> We recognize that Rumsey's approach is supported by the Eighth Circuit, *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir.1993), but for the reasons stated we believe that the Second Circuit has much the better overview of IGRA.

64 F.3d at 1253, n. 1.

Contrary to both the Second and Eighth Circuits, the Court of Appeals in this case found the meaning of "permits" to be unambiguous, and thus that reference to IGRA's legislative history or application of the canon of construction used to resolve ambiguities in statutes enacted for the benefit of Indians would be unnecessary.[17] Nonetheless, the Court of Appeals proceeded to examine the legislative history, and purported to find therein some support for its remarkable conclusion that an unambiguous word can have two completely different – and inconsistent – meanings in the same statute.

The Court of Appeals did not actually find affirmative support in the legislative history for its conflicting construction of the word "permit." Rather, the Court of Appeals only drew a negative inference from the fact that

---

[17] In *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 361 (8th Cir. 1990), the Court of Appeals found that reference to IGRA's legislative history would be appropriate to interpret the seemingly plain language of 25 U.S.C. §2710(7)(C), because "reliance on the plain language . . . alone is not entirely satisfactory. [Cit. Om.]." In *Mashantucket Pequot, supra*, the Second Circuit also felt that reference to the legislative history was essential to properly interpret the statute.

the Senate Report had specifically referred to *Cabazon*'s public policy test in discussing the parameters of Class II gaming, but did not specifically refer to that test in discussing Class III gaming.

In addition to erroneously assigning conflicting meanings to the word "permit," the Court of Appeals also disagreed with the Second and Eighth Circuits by examining the word in isolation, rather than as part of the larger phrase, "located in a state that permits such gaming . . . " As pointed out by the six dissenting Circuit Judges who agreed with the Second Circuit's decision in *Mashantucket Pequot*,

> . . . the proper question is not what Congress meant by "permits," but what Congress meant by "such gaming." Did it mean the particular game or games in issue, or did it mean the entire category of Class III gaming? The structure of IGRA makes clear that Congress was dealing categorically, and that a state's duty to bargain is not to be determined game by game. The time to argue over particular games is during the negotiation process.

*Rumsey v. Wilson, supra*, 64 F.3d at 1254.

By taking the word "permits" out of context in order to give IGRA's language such a crabbed and strained construction, the Court of Appeals not only rejected the contrary conclusions of the Second and Tenth Circuits on the same question, but also disregarded this Court's "eminently sound and vital canon" of statutory construction that ambiguities in enactments for the benefit of Indians are to be liberally construed in favor of the

Indians. *See, e.g., Northern Cheyenne Tribe v. Hollowbreast, supra.*

The Court of Appeals then compounded its error by disregarding this Court's "natural presumption that identical words used in different parts of the same act are intended to have the same meaning[,]" *Atlantic Cleaners & Dyers v. United States,* 286 U.S. 427, 433 (1932), unless "there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Id.* Because both sections of IGRA in which the phrase "permits such gaming" appears are based upon the same source of Constitutional authority – the Indian Commerce Clause (Art. I, §8, cl. 3) none of the exceptions to that presumption are present in this case.

In *California v. Cabazon,* this Court recognized the pre-IGRA importance of Tribal government gaming in attaining federal objectives of strengthening Tribal governments and fostering Tribal economic self-sufficiency:

> These policies and actions, which demonstrate the Government's approval and active promotion of tribal bingo enterprises, are of particular relevance in this case. The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment

> for their members. The Tribes' interests obviously parallel the federal interests.

480 U.S. at 217.

IGRA confirmed this Court's findings, and enshrined in federal statute the right of Tribal governments to continue to utilize gaming to enhance self-determination and economic self-sufficiency, as well as to provide for the proper and effective regulation of all classes of gaming.

If the decision of the Court of Appeals in this case is not reversed, the vast majority of the Nation's Tribes, which are located in the Eighth, Ninth and Tenth Circuits, could be restricted to conducting only those specific Class III games that others are affirmatively allowed to conduct, and conceivably under exactly the same restrictions on game themes, wagers, pot sizes and even operating hours.[18] Given that most Indian Reservations in California and other western states are remote from population centers, the inability of Tribes to conduct forms of Class III gaming that State law does not affirmatively authorize others to conduct, but are not criminally prohibited by State public policy effectively would preclude Tribes from operating economically viable gaming enterprises, because they could not compete with State-sanctioned gaming activities that operate without geographic constraints.

The Second Circuit, in *Mashantucket Pequot*, presciently described the potential consequences of the decision of the Court of Appeals in this case:

---

[18] The decision of the Court of Appeals on this point conflicts with the Eighth Circuit's decision in *United States v. Sisseton-Wahpeton Sioux Tribe, supra.*

> The compact process that Congress established as the centerpiece of IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.

913 F.2d at 1030-31.

The Ninth Circuit's decision in this case has the potential not only to eviscerate the compact negotiation process, but also to severely impair the ability of the Secretary of the Interior to prescribe Class III gaming procedures pursuant to 25 U.S.C. §2710(d)(7)(B)(vii) if State intransigence subverts the compacting process. The Secretary will have to consider not only whether proposed Class III procedures are consistent with the relevant provisions of the laws of the State, but whether the Tribe's Indian lands are located in a Circuit in which the permissible scope of gaming is to be determined by *California v. Cabazon's* public policy test, or some other standard. As a result, the Secretary could be forced to prescribe a much narrower scope of Class III gaming opportunities for Tribes in much of the Eighth and Ninth Circuits than for Tribes located in other judicial Circuits. Nothing in IGRA's language or legislative history would support such an inequitable result.

## II. THIS CASE PRESENTS A UNIQUE OPPORTUNITY TO RESOLVE THE QUESTION WHETHER THE SCOPE OF CLASS III GAMING ON INDIAN LANDS IS TO BE DEFINED BY THE STATE'S PUBLIC POLICY TOWARD SUCH GAMING, OR LIMITED TO THE SPECIFIC CLASS III GAMES AND RULES THAT STATE LAW AFFIRMATIVELY AUTHORIZES OTHERS TO CONDUCT.

In the words of the six Circuit Judges (four active, two senior) who would have granted rehearing *en banc* in this case,

> This is a case of major significance in the administration of the Indian Gaming Regulatory Act ("IGRA") and it has been decided incorrectly, in a manner that conflicts with the Second Circuit's interpretation of the same statutory language. The result is to frustrate the scheme of state-tribal negotiation that Congress established in IGRA.

*Rumsey v. Wilson, supra,* 64 F.3d at 1252-53.

The decision of the Court of Appeals panel would, in the words of the same Judges, effect "the near-nullification of IGRA in a circuit that encompasses a great portion of the nation's Indian country[,]" in that,

> But under Rumsey, this whole process is nipped in the bud if the tribe seeks to operate games that state law, criminal or regulatory, happens to prohibit. The state has no duty to begin negotiations, even though under IGRA a compact may permit the tribe to operate games that state law otherwise prohibits. 18 U.S.C. §1166(c)(2). The State thus has no incentive to negotiate, and

> there is no system to require negotiation. IGRA is rendered toothless.

*Id.*

Prior to this Court's decision in *Seminole*, any number of cases might have presented this Court with an opportunity to resolve the critical question of the proper standard by which the scope of Class III gaming authorized by IGRA should be determined. With *Seminole's* elimination of Tribal judicial remedies against unconsenting States, such cases are unlikely ever to reach this Court.

While *Seminole* may have eliminated Tribal judicial remedies against unconsenting States seeking to subvert the Class III compacting process, it did not resolve, eliminate or diminish the importance of the substantive question of the scope of Class III gaming that may be authorized under IGRA. That question still must be addressed and resolved, not only to guide States that are willing to negotiate in good faith with Tribes even without the threat of IGRA's judicial remedies, but also to guide the Secretary of the Interior in prescribing Class III procedures under 25 U.S.C. §2710(d)(7)(B)(vii).

This case provides the Court with a unique opportunity to decide the important issues presented by the Petition, because unlike the State of Florida in *Seminole*, the State of California expressly consented to the federal courts' exercise of jurisdiction over the Tribes' actions. *Rumsey v. Wilson*, 99 F.3d 321 (9th Cir. 1996). There is no way to predict when – if ever – another such opportunity may arise, and a definitive decision by the Court in this

case would eliminate the need for most such future litigation in any event.

## CONCLUSION

The decision of the Court of Appeals effectively subjugates Petitioners and numerous other Tribes in the Ninth and Tenth Circuits to the dictates of hostile or indifferent State governments and the minutiae of State gambling laws in ways never intended by the Congress, and thereby precludes the Tribes from ever having a meaningful opportunity to utilize Tribal governmental Class III gaming to create unsubsidized employment and income for their people and generate revenues that Tribal governments desperately need in order to function and provide services to their communities. For these reasons, and for the reasons set forth above, the Court should grant the Petition and reverse the judgment of the Court of Appeals.

DATED this 30th day of December, 1996.

Respectfully submitted,

GEORGE FORMAN
*Counsel of Record*
PATRICIA A. PROCHASKA
FORMAN & PROCHASKA
*Attorneys for Sycuan Band of Mission Indians, et al.*

## APPENDIX A

**RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS; Table Mountain Rancheria; Cher-Ae Heights Indian Community of the Trinidad Rancheria; San Manual Band of Mission Indians, Viejas Reservation of the Capitan Grande Band of Diegueno Mission Indians and Hopland Band of Pomo Indiana; Barona Band of Mission Indians; Sycuan Band of Mission Indians; Agua Caliente Band of Cahuilla Indians,**
**Plaintiffs-Appellees,**

**v.**

**Pete WILSON, Governor; State of California,**
**Defendants-Appellants.**
**RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS:**
**Table Mountain Rancheria; Cher-Ae Heights Indian Community of the Trinidad Rancheria; San Manual Band of Mission Indiana, Viejas Reservation of the Capitan Grande Band of Diegueno Mission Indians and Hopland Band of Pomo Indians; Wintun Indians; San Manual Band of Mission Indians; Cabazon Band of Mission Indians; The Santa Ynez Band of Chumash Mission Indians of the Santa Ysabel Reservation, California; Viejas Reservation of the Capitan Grande Band of Diegueno Mission Indians; San Manual Band of Mission Indians; The Hopland Band of Pomo Indians; The Sycuan Band of Mission Indians; The Morongo Band of Mission Indians; The Santa Rosa Band of Tache Indians; The Cachil Dehe Band of Wintun Indians of the Colusa Indian Community; The Soboba Band of Cahuilla Mission Indians; The Robinson Band of Pomo Indians; The Agua Caliente**

**Band of Cahuilla Indians; and The Barona Group of the Capitan Grande Band of Mission Indians, Plaintiffs-Appellees-Cross-Appellants,**

**v.**

**Pete WILSON, Governor; State of California, Defendants-Appellants-Cross-Appellees.**

**Nos. 93-16609, 93-16745.**

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 10, 1994.

Decided Nov. 15, 1994.

As Amended on Denial of Rehearing and
Rejection of Suggestion for Rehearing En Banc
Aug. 11, 1995.

Based on stipulation between parties, Indian tribes filed suit seeking declaration as to whether state was obligation [sic] to negotiate with tribes regarding proposed gaming activities under Indian Gaming Regulatory Act (IGRA). The United States District Court for the Eastern District of California, Garland E. Burrell, Jr., J., entered summary judgment for tribes, finding that, except for certain banking and percentage card games, proposed gaming activities were proper subject of negotiation. State appealed, and tribes cross-appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that: (1) state was not required to negotiate with respect to banked or percentage card games with traditional casino theme; (2) with possible exception of video lottery terminals, California law did not permit stand-alone electronic gaming machines, and state thus was not required to

negotiate with respect to those proposed gaming activities; and (3) remand was required as to whether state permitted operation of slot machines in form of state lottery or otherwise.

Affirmed in part; reversed in part, and remanded; petitions for rehearing denied; suggestion for rehearing en banc rejected.

Wallace, Chief Judge, concurred and filed opinion.

Canby, Circuit Judge, dissented from denial of rehearing en banc and filed opinion, joined by Pregerson, Reinhardt, and Hawkins, Circuit Judges.

Opinion, 41 F.3d 421, superseded.

Manuel M. Medeiros, Deputy Atty. Gen., Sacramento, CA, for defendants-Appellants-Cross-appellees.

Appeals from the United States District Court for the Eastern District of California.

Before: WALLACE, Chief Judge; O'SCANNLAIN, Circuit Judge; KELLEHER,* District Judge.

Opinion by Judge O'SCANNLAIN; Concurrence by Chief Judge WALLACE; Dissent to Order by Judge CANBY; Concurrence to Dissent by Judges FERGUSON and NORRIS.

---

* The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

ORDER

The opinion filed on November 15, 1994 at slip op. 13873 is amended as follows:

[Editor's Note: Amendments incorporated for purpose of publication.]

The panel has voted to deny the petitions for rehearing. Chief Judge Wallace and Judge O'Scannlain have voted to reject the suggestions for rehearing en banc, and Judge Kelleher has so recommended.

The full court was advised of the suggestions for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed.R.App.P. 35.

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

CANBY, Circuit Judge, joined by PREGERSON, REINHARDT, and HAWKINS, Circuit Judges, dissenting from the denial of rehearing en banc:

This is a case of major significance in the administration of the Indian Gaming Regulatory Act ("IGRA") and it has been decided incorrectly, in a manner that conflicts with the Second Circuit's interpretation of the same statutory language. The result is to frustrate the scheme of state-tribal negotiation that Congress established in IGRA. We should have granted rehearing en banc to prevent the near-nullification of IGRA in a circuit that encompasses a great portion of the nation's Indian country. Our failure to do so may close the only route open to many tribes to escape a century of poverty.

*Rumsey* holds that California, which permits several varieties of Class III gambling, has no duty under IGRA to negotiate with the tribes over the tribes' ability to conduct any game that is illegal under California law. This ruling effectively frustrates IGRA's entire plan governing Class III Indian gaming. The primary purpose of IGRA, as set forth in the Act, is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA's otherwise drastic extension of state gaming law to Indian country (to be enforced only by the federal government) was modified by IGRA's process by which the states and tribes could arrive at compacts specifying what games might be allowed and who might have jurisdiction to enforce gaming laws. See 25 U.S.C. § 2710(d)(3); 18 U.S.C. § 1166(c)(2) (exempting Class III gaming conducted pursuant to a tribal-state compact from the application of state gaming laws extended into Indian country by § 1166(a)). The whole idea was to foster these compacts. That goal is defeated if the details of the state's regulatory schemes, allowing some games and prohibiting others, apply if the state does nothing. Thus the Second Circuit, in arriving at a conclusion precisely opposite to that of *Rumsey*, stated:

> Under the State's approach, . . . even where a state does not prohibit class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accord with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming. The compact process that Congress established as the centerpiece

> of the IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.

*Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030-31 (2d Cir.1990).[1]

The Second Circuit's fears of turning IGRA's compact process into a dead letter are well-founded. It is well to keep in mind that the issue here is not whether California must allow every game the tribes want to conduct; it is merely whether California has a duty to negotiate with the tribes to determine what games should be conducted, on what scale, and who has jurisdiction to enforce gaming laws. In passing IGRA, Congress knew that states and tribes both had important interests at stake. If a state has a genuine prohibitory public policy against all Class III gaming, as some states do, it can rest on that policy and not entertain the possibility of Indian Class III gaming within its borders. States like California that have no such wholesale public policy against Class III gaming must, under IGRA, reach an accommodation between their interests and the strong interests of the tribes in conducting such gaming. IGRA's method of reaching such an accommodation is by negotiation between the two affected groups. IGRA imposes on the states a duty to negotiate compacts in good faith. That duty is enforceable in federal court with the aid, if necessary, of a court

---

[1] We recognize that Rumsey's approach is supported by the Eighth Circuit, *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir.1993), but for the reasons stated we believe that the Second Circuit has much the better overview of IGRA.

appointed mediator to arrive at a compact and the Secretary of the Interior to dictate a compact if the parties do not accept the mediator's ruling. 25 U.S.C. § 2710(d)(7). But under Rumsey, this whole process is nipped in the bud if the tribe seeks to operate games that state law, criminal or regulatory, happens to prohibit. The state has no duty to begin negotiations, even though under IGRA a compact may permit the tribe to operate games that state law otherwise prohibits. 18 U.S.C. § 1166(c)(2). The State thus has no incentive to negotiate, and there is no system to require negotiation. IGRA is rendered toothless.

Such a nullifying interpretation of IGRA might be understandable if it were required by the plain words of the statute, but it is not. Rumsey defeats the congressional plan for Class III gaming by a manifestly flawed interpretation of the statutory language. In deciding that California had no duty to negotiate with the plaintiff tribes, the *Rumsey* opinion asked and answered the wrong question. IGRA provides:

> Class III gaming activities shall be lawful on Indian lands only if such activities are –
>
> . . . .
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity. . . .

25 U.S.C. § 2710(d)(1)(B) (emphasis added). Thus the state must negotiate with a tribe if the state "permits such gaming." The *Rumsey* opinion regards the key question as being whether the word "permits" is ambiguous; it holds that the word is not ambiguous, so the State need not bargain. But the proper question is not what Congress

meant by "permits," but what Congress meant by "such gaming." Did it mean the particular game or games in issue, or did it mean the entire category of Class III gaming? The structure of IGRA makes clear that Congress was dealing categorically, and that a state's duty to bargain is not to be determined game-by-game. The time to argue over particular games is during the negotiation process.

The only natural reading of section 2710(d)(1)(B) is that, when Congress says "Class III gaming activities shall be lawful . . . if located in a State that permits such gaming," then "such gaming" refers back to the category of "Class III gaming," which is the next prior use of the word "gaming." Rumsey interprets the statutory language as if it said: "A Class III game shall be lawful . . . if located in a State that permits that game." But that is not what Congress said, and it is not a natural reading of the statutory language. The plain language cuts directly against Rumsey; Congress allows a tribe to conduct Class III gaming activities (pursuant to a compact) if the State allows Class III gaming by anyone.

Furthermore, Class II gaming is governed by virtually identical language in section 2710(b)(1)(A). A tribe may conduct and regulate "Class II gaming . . . if such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity. . . . " 25 U.S.C. § 2710(b)(1)(A) (emphasis added). We have held that the state cannot allow or disallow Class II Indian gaming game-by-game. *Sycuan Band of Mission Indians v. Miller*, 54 F.3d 535 (9th Cir.1995) (amended opinion). Our decision in *Sycuan Band* followed the reasoning of the Supreme Court in *California v.*

*Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), the seminal Indian gaming case that ultimately led to the passage of IGRA. In deciding for purposes of Public Law 280 whether California's prohibition of high-stakes bingo could be enforced against the Band, the Supreme Court noted that "[t]he shorthand test is whether the conduct at issue violates the State's public policy." After reviewing California's treatment of gambling, the Court stated:

> In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.

Id. at 211, 107 S.Ct. at 1089 (emphasis added). Thus, *Cabazon Band* ascertained California's public policy at a level of generality far above that of the individual game in issue, and concluded that the Band could conduct high-stakes bingo even though California made that activity a misdemeanor. We applied a similarly broad and categorical approach to Class II gaming in *Sycuan Band*.

The *Rumsey* opinion refuses to apply the reasoning of *Cabazon Band* and *Sycuan Band*, and instead holds that a class-wide, categorical approach is precluded by the "unambiguous" plain words of section 2710(d)(1)(B), even though identical words in section 2710(b)(1)(A) require a contrary result for Class II gaming. The majority in *Rumsey* justifies its interpretation by referring to the Senate Committee Report on IGRA, which approves the approach of *Cabazon Band* for Class II gaming but says nothing about *Cabazon Band*'s applicability to Class III

gaming. See Sen.Rep. No. 100-446, 1988 U.S.C.C.A.N. 3071, 3076. But we should not read a congressional negative into a committee report's failure to mention Cabazon Band in regard to Class III gaming. Cabazon Band dealt with games that IGRA placed in Class II, and that is explanation enough why the discussion of Cabazon Band in the Committee's report arose only in connection with Class II gaming. The fact remains that Congress wrote provisions of essentially identical wording and structure to govern both Class II and Class III gaming. We should give them both the same categorical meaning.

*Rumsey* has thus misconstrued IGRA's Class III gaming provisions, and has done so in a manner that defeats Congress's intention and causes great economic harm to numerous tribes. With all respect to the Rumsey panel, we dissent from the denial of rehearing en banc.

FERGUSON and NORRIS, Senior Circuit Judges:

We agree with the views expressed by Judge Canby.

## OPINION

O'SCANNLAIN, Circuit Judge:

We decide whether certain gaming activities are permitted under California law and thus subject to tribal-state negotiation under the Indian Gaming Regulatory Act.

### I

Numerous federally recognized Indian tribes currently engage in various gaming activities on tribal lands

in California. Desiring to engage in additional activities (the "Proposed Gaming Activities"), several tribes asked the State of California (the "State") to negotiate a compact permitting the operation of certain stand-alone electronic gaming devices[9] and live banking and percentage card games.[10] The State refused to negotiate with the tribes, asserting that the Proposed Gaming Activities were illegal under California law.

The State and seven tribes subsequently entered into a stipulation to seek judicial determination of whether the State was obligated to negotiate with the tribes. These tribes filed a complaint for declaratory judgment with the district court under the Indian Gaming Regulatory Act ("IGRA"), 25 §§ U.S.C. 2701-2721. Four other complaints, filed by different Indian tribes, were consolidated with this action (plaintiffs collectively referred to as the "Tribes").

The parties filed cross-motions for summary judgment. The district court awarded summary judgment to

---

[9] Included among these electronic games are electronic pull tab machines, video poker devices, video bingo devices, video lotto devices, and video keno devices. The parties agree that California allows these games to be played in nonelectronic formats.

[10] A card game is "banked" if a gaming operator participates in the game with the players and acts as a house bank, paying all winners and retaining all other players' losses. *Sullivan v. Fox*, 189 Cal.App.3d 673, 679, 235 Cal.Rptr. 5 (1987). A card game is a "percentage" game if the gaming operator has no interest in the outcome of a game but takes a percentage of all amounts wagered or won. Id.

the Tribes, finding that, except for banking and percentage card games using traditional casino game themes, the Proposed Gaming Activities were a proper subject of negotiation. The State timely appealed, and the Tribes filed a cross-appeal.

II

Enacted in 1988 as means of "promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), IGRA creates a framework for Indian tribes to conduct gaming activities on tribal lands. IGRA divides gaming into three classes. *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 993 (9th Cir.1994). " 'Class I' consists of social games for minimal prizes and traditional Indian games; 'Class II' includes Bingo and similar games of chance such as pull tabs and lotto; 'Class III' includes all games not included in Classes I or II." Id.; 25 U.S.C. § 2703(6)-(8). The parties agree that the Proposed Gaming Activities are Class III games.

A tribe seeking to operate Class III gaming activities on tribal lands generally may do so only under a compact. A tribe initiates the compacting process by asking a state to engage in negotiations. 25 U.S.C. § 2710(d)(3)(A). IGRA obligates the state to negotiate in good faith with the tribe; and, if the parties reach agreement, they sign a Tribal-State compact. Id. at § 2710(d)(3)(A)-(B).

If a state refuses to negotiate in good faith, the tribe can bring a civil suit, whereupon a federal district court may order the state and tribe to conclude a compact within 60 days. Id. at § 2710(d)(7)(A)-(B). If a compact is

not reached within that period, the tribe and the state must submit their last best offers to a court-appointed mediator, who selects one of the offers as the compact. Id. at § 2710(d)(7)(B)(iv). The state then has 60 days to decide whether to consent to the compact. Id. at § 2710(d)(7)(B)(vi). If the state does not approve the compact, the Secretary of the Interior may prescribe regulations for Class III gaming on tribal lands. Id. at § 2710(d)(7)(B)(vii)(II); Spokane, 28 F.3d at 993.

In the instant case, the State opted not to negotiate over the Proposed Gaming Activities. The State asserts two reasons why it need not negotiate with the Tribes. The first reason is that the Act itself does not require negotiation. The second reason is that the Act violates the Tenth Amendment. Because the first reason persuades us, we do not reach the second.

The State contends that IGRA does not obligate it to negotiate with the Tribes over the Proposed Gaming Activities. IGRA provides that "Class III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity. . . . " 25 U.S.C. § 2710(d)(1)(B) (emphasis added). Consequently, where a state does not "permit" gaming activities sought by a tribe, the tribe has no right to engage in these activities, and the state thus has no duty to negotiate with respect to them.

The parties disagree as to whether California "permits" the Proposed Gaming Activities. The State's argument is straightforward: the Proposed Gaming Activities are illegal. California law prohibits the operation of a

banked or percentage card game as a misdemeanor offense. Cal.Penal Code § 330 (Deering 1993). In addition, according to the State, the stand-alone electronic gaming machines sought by the Tribes are electronic "slot machines." California law prohibits the operation of slot machines as a misdemeanor offense, Cal.Penal Code §§ 330a, 330b, and a California appellate court has indicated that electronic machines of the sort requested by the Tribes fall within the scope of this prohibition. *Score Family Fun Center, Inc. v. County of San Diego*, 225 Cal.App.3d 1217 (1990).

The Tribes offer a broader reading of IGRA, claiming that a state "permits" a specific gaming activity if it "regulates" the activity in general rather than prohibiting it entirely as a matter of public policy. Under this approach, a specific illegal gaming activity is "regulated," rather than "prohibited," if the state allows the operation of similar gaming activities. The Tribes observe that video lottery terminals, parimutuel horse racing, and non-banked, nonpercentage card gaming are legal in California. Because the Tribes view these activities as functionally similar to the Proposed Gaming Activities, they conclude that California regulates, and thus permits, these activities.

The Tribes cite to the Supreme Court's pre-IGRA decision, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), in support of their view. In *Cabazon*, the State of California objected to an Indian tribe's operation of bingo games on tribal land. The State argued that the tribe's bingo games violated a penal statute imposing prize limits and limiting bingo operators to unpaid members of charities. When

the State sought to enforce its penal statute against the tribe, the tribe brought a declaratory judgment action. The district court awarded summary judgment to the tribe, and this court affirmed.

The Supreme Court held that summary judgment properly was granted. At the time, gaming on tribal lands fell under Public L. 280. Pub.L. No. 280, 67 Stat. 588 (codified as amended in 18 U.S.C. § 1162, 28 U.S.C. § 1360). Under Public Law 280, Congress granted states the right to extend their criminal jurisdiction over offenses committed on tribal lands, 18 U.S.C. § 1162, but granted states only limited civil jurisdiction over these lands. 28 U.S.C. § 1360(a). Against this background, the Court observed that, "when a State seeks to enforce a law within an Indian reservation under the authority of Public Law 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation . . . , or civil in nature." 480 U.S. at 208, 107 S.Ct. at 1088.

The Court held that the fact that "an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280." Id. at 211, 107 S.Ct. at 1089. Instead, it explained that there was:

> a distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws: if the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its

> enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.

Id. at 209, 107 S.Ct. at 1088 (emphasis added). Applying this test to bingo gaming in California, the Court found that California law permitted a large variety of gaming activities, including bingo. Id. at 210-11, 107 S.Ct. at 1088-89. It concluded that the state "regulates rather than prohibits gambling in general and bingo in particular," id. at 211, 107 S.Ct. at 1089, and held that the Indian tribes thus were entitled to engage in their gaming activities.

Congress enacted IGRA in response to *Cabazon. Spokane*, 28 F.3d at 993. The Tribes assert that IGRA codified *Cabazon*'s "criminal/regulatory" test. Under this approach, which was adopted by the district court in this case, a court must determine whether a gaming activity, even if illegal, violates a state's public policy. If it does, then the activity is "criminally" prohibited. If it does not, then the activity is merely "regulated" and, thus, "permitted" for the purpose of applying IGRA.

We reject this reading of IGRA. In interpreting IGRA, we use our traditional tools of statutory construction. "Interpretation of a statute must begin with the statute's language." *Mallard v. United States Dist. Ct. for the So. Dist. of Iowa*, 490 U.S. 296, 301, 109 S.Ct. 1814, 1817, 104 L.Ed.2d 318 (1989). "The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 243, 109 S.Ct. 1026, 1031-32, 103 L.Ed.2d 290 (1989) (quotation

omitted). In most cases, "if we find the statutory language unambiguous, then we will not resort to legislative history" to guide our review. *Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir.1988). Finally, although statutes benefitting Native Americans generally are construed liberally in their favor, we will not rely on this factor to contradict the plain language of a statute. Cf. *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1342 (9th Cir.1987).

Section 2710(d)(1)(b) is unambiguous. In *United States v. Launder*, 743 F.2d 686 (9th Cir.1984), we adopted a dictionary definition of the term "permit" as meaning " '[t]o suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act.' " Id. at 689 (quoting from Black's Law Dictionary). Clearly, California does not allow banked or percentage card gaming. With the possible exception of video lottery terminals,[11] electronic gaming machines fitting the description of "slot machines" are prohibited.

The fact that California allows games that share some characteristics with banked and percentage card gaming – in the form of (1) banked and percentage games other than card games and (2) nonbanked, nonpercentage card games is not

---

[11] The district court expressly declined to reach the question of whether California allows the operation of a slot machine in the form of the state lottery. The State concedes that, if the state lottery is in fact a slot machine, then California "permits" the operation of these devices. The district court also apparently declined to reach the Tribes' questionable argument that California allows the operation of slot machines in the form of punchboards.

evidence that the State permits the Proposed Gaming Activities. Nor is it significant that the state lottery, if not technically a slot machine, is functionally similar to one. In *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir.1993), a tribe sought to operate a traditional form of keno as well as casino-type gambling. When the State of South Dakota refused to negotiate, the tribe filed suit, arguing that the video keno and charity-run casino-type gaming were legal in the state. The Eighth Circuit rejected this argument. First, it found that the state permitted charities to operate bingo and raffles, but not casino-type gambling. Second, it held that the state:

> need not negotiate traditional keno if only video keno is permitted in South Dakota. The "such gaming" language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit. Because video keno and traditional keno are not the same and video keno is the only form of keno allowed under state law, it would be illegal . . . for the tribe to offer traditional keno to its patrons.

Id. at 279. The court thus concluded that South Dakota had not failed to negotiate in good faith by refusing to negotiate over traditional keno and casino-type gaming. *Accord Coeur D'Alene Tribe v. Idaho*, 842 F.Supp. 1268, 1280 n. 9 (D.Idaho 1994), aff'd, 51 F.3d 876 (9th Cir.1995).

We agree with the approach taken by the Eighth Circuit. IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a

gaming activity "for any purpose by any person, organization, or entity," then it also must allow Indian tribes to engage in that same activity. 25 U.S.C. § 2710(d)(1)(B). In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.[12]

---

[12] Our decision in *Sycuan Band of Mission Indians v. Roache*, No. 93-55430, slip op. 4879 (9th Cir. Apr. 28, 1995) is not to the contrary. In *Sycuan Band*, this court held that California lacked jurisdiction to enforce its laws against certain Class III gaming activities on tribal lands because IGRA vests exclusive jurisdiction with the federal government. Slip op. at 4889 (citing 18 U.S.C. § 1166(d)). In the course of its analysis, the court also suggested that, even if the gaming devices at issue were Class II gaming, California would lack authority to enforce its law on tribal lands. The court relied on the statement in *Cabazon* that California "regulates rather than prohibits gambling in general and bingo in particular." Slip op. at 4889 (quoting *Cabazon*, 480 U.S. at 211, 107 S.Ct. at 1089). The court interpreted this statement expansively to mean that California's gambling laws regarding Class II-type gaming fall on the civil/regulatory side of *Cabazon's* test; thus, California lacked jurisdiction to enforce these laws on tribal lands. As an initial matter, the *Sycuan Band* court's analysis of *Cabazon Band* in the context of Class II gaming is dicta; the court expressly held that the gaming at issue was Class III gaming. Slip op. at 4892-98. Moreover, in its discussion of *Cabazon Band*, the *Sycuan Band* court expressed no opinion on its relevance for Class III-type gaming, slip op. at 4888, the type of gaming at issue here. For the reasons expressed above, we have determined that the analysis of whether a type of gaming is permitted by a state under IGRA differs depending on the class of gaming involved.

III

Because we find the plain meaning of the word "permit" to be unambiguous, we need not look to IGRA's legislative history. *See United States v. Taylor*, 487 U.S. 326, 344-46, 108 S.Ct. 2413, 2424-2425, 101 L.Ed.2d 297 (1988) (Scalia, J., concurring). However, a brief examination helps to clarify why the word has different meanings with respect to Class II and Class III gaming.

The primary source of IGRA's legislative history, the Senate Report accompanying its passage, does not describe the circumstances in which a state "permits" a gaming activity in the context of Class III gaming. The only relevant passages occur in the Senate Report's discussion of Class II gaming:

> [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*.

S.Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3071, 3076. The Senate Report continues:

> The phrase "for any purpose by any person, organization or entity" makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally

> prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.

Id. at 3082.

The Tribes point to those statements as evidence that Congress intended that *Cabazon's* "criminal/regulatory" test govern for the purposes of determining whether a Class II gaming activity is permitted on Indian lands. The Tribes then observe that IGRA's Class II gaming provisions contain the same language used for Class III gaming: "An Indian tribe may engage in . . . class II gaming on Indian lands . . . if . . . such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity. . . . " 25 U.S.C. § 2710(b)(1)(A) (emphasis added). Relying upon the maxim that identical language in a statute should be interpreted to have the same meaning, the Tribes infer that the Senate Report establishes the applicability of the *Cabazon* test to Class III gaming.

However, that inference is incorrect. "Identical words appearing more than once in the same act, and even in the same section, may be construed differently if it appears they were used in different places with different intent." *Vanscoter v. Sullivan*, 920 F.2d 1441, 1448 (9th Cir.1990). Such is the case for Class III gaming. The Senate Report repeatedly links the *Cabazon* test to Class II gaming while remaining silent as to Class III gaming – a fact that itself suggests that Class II and III provisions should be treated differently. Cf. *Arizona Elec. Power Coop. v. United States*, 816 F.2d 1366, 1375 (9th Cir.1987) (expressio unius principle). Further, Congress envisioned different roles for Class II and Class III gaming. It intended

that tribes have "maximum flexibility to utilize [Class II] games such as bingo and lotto for tribal economic development," S.Rep. No. 466, 1988 U.S.C.C.A.N. at 3079, and indicated that Class II gaming would be conducted largely free of state regulatory laws. Id. at 3079, 3082. Congress was less ebullient about tribes' use of Class III gaming, however, and indicated that Class III gaming would be more subject to state regulatory schemes. Id. at 3083-84. Even if we found it necessary to rely upon IGRA's legislative history, it supports the plain meaning of the term "permit" with regard to IGRA's Class III provisions.[13]

---

[13] The Tribes cite to *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir.1990), cert. denied, 499 U.S. 975, 111 S.Ct. 1620, 113 L.Ed.2d 717 (1991), as authority for attributing the "Class II" legislative history to Class III. In *Mashantucket*, an Indian tribe sought to engage in "games of chance" that the State of Connecticut allowed charities to operate during "Las Vegas nights." Relying on the "Class II" legislative history, the court held that *Cabazon's* "criminal/regulatory" test applied to Class III gaming. Id. at 1030-31. It concluded that, because Connecticut permitted the games of chance to be operated by some persons in the state, the state had to negotiate over those games with the Tribes.

While we disagree, for the reasons expressed above, with the *Mashantucket* court's use of the Class II legislative history to interpret IGRA's Class III provisions, we believe that the court nevertheless reached the correct result. As we have explained, IGRA's text plainly requires a state to negotiate with a Tribe over a gaming activity in which the state allows others to engage, and no resort to legislative history is necessary to support this conclusion.

Because Connecticut allowed charities to operate games of chance, it had to negotiate with the tribe over these games.

> The Tribes also assert that the State is barred by issue preclusion from relitigating *Cabazon's* finding that California "regulates . . . gambling in general." 480 U.S. at 211, 107 S.Ct. at 1089. Since we do not apply the *Cabazon* "criminal/regulatory" test here, we need not reach this argument.

IV

With the possible exception of slot machines in the form of video lottery terminals, California has no obligation to negotiate with the Tribes on the Proposed Gaming Activities, and the trial court judgment is reversed to that extent. We affirm the district court's judgment that the State need not negotiate over banked or percentage card games with traditional casino themes. We remand to the district court to consider the limited question of whether California permits the operation of slot machines in the form of the state lottery or otherwise.

AFFIRMED in part, REVERSED in part, and REMANDED. Each party to bear its own costs.

WALLACE, Chief Judge, concurring:

I concur with parts I and II of this opinion. However, I concur only in the result of part III, because the discussion of the legislative history of the Indian Gaming Regulatory Act (Act) is unnecessary. Having concluded that the plain language of the Act controls this case, our

opinion should end. The discussion of the Act's legislative history gives the impression that the Act is not as clear as we say, and that some additional reason is required before we hold as we do. "Where we are not prepared to be governed by what the legislative history says – to take, as it were, the bad with the good – we should not look to the legislative history at all. This text is eminently clear, and we should leave it at that." *United States v. Taylor*, 487 U.S. 326, 345, 108 S.Ct. 2413, 2424, 101 L.Ed.2d 297 (1988) (Scalia, J., concurring).

## APPENDIX B

RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS, *et al.*,

*Plaintiffs-Appellees-Cross-Appellants,*

v.

PETE WILSON, Governor; STATE OF CALIFORNIA,

*Defendants-Appellants-Cross-Appellees.*

Before: WALLACE and O'SCANNLAIN, Circuit Judges; KELLEHER,* District Judge.

### ORDER

(Filed October 29, 1996)

By order dated December 5, 1995 this panel construed appellees' letter briefs of August 28, 1995 as a renewed petition for rehearing in light of a California appellate court decision. We deferred consideration of the petition pending the decision by the California Supreme Court in that case, *Western Telcon v. California State Lottery*, 53 Cal. Rptr. 2d 812 (Cal. 1996). The California Court has

* The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

issued its opinion and the parties have filed additional letter briefs on the impact of *Western Telcon* on our decision in this matter. We have considered the arguments of the parties and are not persuaded that the decision in *Western Telcon* has any impact on our decision in *Rumsey*. Therefore, our opinion will remain unchanged.

The motion of GTECH Corporation for leave to file an amicus brief regarding the remand order in this matter is DENIED.

The Opinion filed on November 15, 1994, as amended August 11, 1995, slip op. 9977, and appearing at 64 F.3d 1250 (9th Cir. 1995), is further amended as follows:

> At slip op. 9988 [64 F.3d at 1255], add the following footnote after the second sentence of the first full paragraph:
>
> > Since the State agreed not to "plead the Eleventh Amendment to the United States Constitution as a jurisdictional bar to the instant action," the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), has no effect on our jurisdiction over this appeal. *Id.* at 1119 (holding that § 2710(d)(7) of IGRA "cannot grant jurisdiction over *a State that does not consent to be sued*") (emphasis added); *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985) ("if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action").

With this amendment, the panel has unanimously voted to deny the appellees' renewed petition for rehearing.

The petition for rehearing is DENIED. The mandate shall issue in the normal course.

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS, TABLE MOUNTAIN RANCHERIA; CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA; SAN MANUAL BAND OF MISSION INDIANS; VIEJAS RESERVATION OF THE CAPITAN GRANDE BAND OF DIEGUENO MISSION INDIANS; HOPLAND BAND OF POMO INDIANS,<br><br>Plaintiffs,<br><br>v.<br><br>GOVERNOR PETE WILSON; STATE OF CALIFORNIA,<br><br>Defendants.<br><br>AND CONSOLIDATED CASES | CIV-S-92-812 GEB<br><br>AMENDED ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT<br><br>(Filed Jul. 20, 1993) |

## I. INTRODUCTION

Plaintiffs are federally-recognized Indian tribes (the "Tribes") having tribal lands within the State of California. The Tribes currently engage in various gaming activities and wish to operate additional games. Accordingly, the Tribes requested the State to negotiate Tribal-State

compacts permitting certain new games on their lands. The State refused to negotiate, claiming that the games proposed by the Tribes are prohibited in California. Moreover, the State contends that the new games are contrary to public policy and may not be permitted in a Tribal-State compact.

The Indian Gaming Regulatory Act ("IGRA") permits Indian tribes in California to operate any game that California permits to be played "for any purpose by any person." 25 U.S.C. § 2710(b)(1)(A). A gaming activity will not violate California's public policy unless such activity is prohibited, rather than regulated, under California law. *California v. Cabazon*, 480 U.S. 202 (1987). As the California lottery operates games that are extremely similar to the electronic games requested by the Tribes, those electronic games are permitted by the State within the meaning of § 2710(b)(1)(A). Moreover, those games do not violate California's public policy and are permissible on Indian land under IGRA.

Not all the Tribes' proposed games are comparable to State Lottery games or comport with the State's public policy. The State has consistently maintained a strong public policy prohibiting casino gambling, including banking card games and percentage card games. Accordingly, such games are prohibited in California, are against the State's public policy, and may not be operated by the Tribes.

## II. BACKGROUND

This declaratory relief action was filed pursuant to a stipulation between the parties seeking a determination

whether California law or public policy prohibits any or all of the Tribes' proposed games to be played within California's borders.

A. The Games Proposed By The Indian Tribes

The Tribes seek to augment their gaming activities by adding several new games. The proposed games are characterized as banking card games, percentage card games, electronic pull-tab games, electronic poker games, video bingo, lotto and keno games and other electronic number or symbol matching games. Banking card games are card games in which the gaming operator both participates in the game with the players and acts as a house bank. As the house bank, the operator pays all winners and retains all the other players' losses. Blackjack is a well-known example of a banking card game.

Percentage card games are card games in which the operator has no interest in the outcome of the game and simply takes a percentage of the amount wagered or won. The operator does not play in the game or against any of the players. Accordingly, players in a percentage card game bet against each other rather than the gaming enterprise.

Electronic pull tab games are simply an electronic version of games commonly known as "pull-tabs." In pull-tab games, a player purchases a ticket or a play from a finite pool of tickets containing a fixed number of winners. Each ticket contains concealed numbers or symbols which the player exposes to determine whether the ticket contains a winning combination. Electronic pull-tabs use a programmed computer chip to randomly select

an electronic "ticket" from a deal containing a finite number of plays with a fixed number of winners. A printer produces a winning receipt which is then presented to the gaming operator.

Electronic poker games are an electronic rendition of draw poker. A computer randomly "deals" five "cards" to the player from a fifty-two card deck and visually displays the cards on the video screen. A player may discard from one to five cards, and is "dealt" replacement cards by the computer. Players who match pre-determined winning poker "hands" are awarded credits which can be used for replays or cash prizes.

Video bingo, lotto, keno and other electronic video games are video versions of bingo and keno or other matching games. These electronic matching games are substantially similar to electronic pull-tab games, except that the computer, rather than the player, selects symbols or numbers to be played. Moreover, these electronic video games are extremely similar to electronic poker games, except that instead of cards, numbers or symbols are selected by the computer for the player. In electronic matching games, like electronic pull-tab and poker games, the player wins if his or her symbols or numbers match the symbols or numbers chosen by the computer. In these games the computer may be programmed to pay out a fixed percentage of the amount wagered.[1]

---

[1] None of the electronic devices plaintiffs wish to operate would dispense coins or currency, nor would they utilize a drum or reel or be activated by a handle such as mechanical slot machines.

B. Gaming Activities Permitted in California

By any measure, California permits a substantial amount of gambling activity. *See Cabazon*, 480 U.S. at 212. For example, California allows parimutuel horse-race betting (Cal. Const., art. 4, § 19(b); Cal. Bus. Prof. Code Ann. §§ 19400-19667), gambling card games not expressly named by statute (Cal. Penal Code Ann. § 330) and bingo games. In addition, California operates a lottery and "daily encourages its citizens to participate in this state run gambling." *Cabazon*, 480 U.S. at 211.

In the six years since the *Cabazon* Court examined California's gaming activity, the State has significantly expanded the types of games played by the State Lottery. The State Lottery no longer simply consists of the familiar weekly drawing. The State Lottery Commission introduced a new game called Scratchers after approving the necessary regulations on February 21, 1991. That game is played by removing the latex covering from a ticket to expose the ticket symbols. Various game themes are permitted under the regulations.[2] Scratchers, along with all

---

[2] These game themes include matching three play symbols, matching two symbols and the variant, matching three identical play symbols in a horizontal row, adding all of the play symbols to exceed the required total amount, revealing three play symbols either diagonally, vertically, or horizontally on a nine symbol grid, matching the key play symbol and others.

of its game-theme variations, is essentially a pull-tab game.[3]

Another State Lottery game is called Fantasy 5. To play Fantasy 5, a player either selects, or requests the computer to randomly select, five numbers from a field of 1 to 39. Each Tuesday, Thursday and Friday the winning Fantasy 5 numbers are randomly selected with the aid of a computer or mechanical device. Prizes are paid on a parimutuel basis, except that fixed prizes are paid to players who match three out of the five numbers.

Finally, the State Lottery offered electronic Keno to the California public following approval of new regulations on October 14, 1992. Keno is an on-line, interactive lottery game in which a player selects from one to ten numbers from a field of 80 numbers on a computer terminal. Players may even avoid the deliberation necessary to select which numbers to play by simply requesting the computer to automatically and randomly generate the player's numbers. A Lottery Information Display System or lottery monitor displays the 20 winning numbers selected by computerized draw equipment. During gaming hours, new draws are held and winning numbers are displayed every five minutes. Players win and are paid fixed dollar prizes according to the number of winning numbers they have matched. In addition, players who match ten winning numbers may win a parimutuel prize.

---

[3] In addition, Scratcher players may be eligible to participate in the Big Spin, in which a large wheel with a ball inside is spun. The player wins the amount of money printed on the space where the ball comes to rest as the wheel stops.

## III. ANALYSIS

### A. Jurisdiction

The court has subject matter jurisdiction under 28 U.S.C. § 1362.[4] The impasse between the Tribes and the State in negotiating a Tribal-State compact based upon the application of State law to the disputed games is an actual controversy warranting declaratory relief. *Spokane Indian Tribe v. U.S.*, 972 F.2d 1090, 1092 (9th Cir. 1992); *Oneida Tribe of Indians v. State of Wis.*, 951 F.2d 757, 759 (7th Cir. 1991) ("actual controversy" was present when Tribal-State compact negotiations reached an impasse because of disagreement over the term "lotto").[5]

---

[4] 28 U.S.C. § 1362 provides that:

> The district courts shall have original jurisdiction of all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

It is undisputed that the plaintiff tribes are federally recognized within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(5) and that this case arises under the same federal statute.

[5] The State waives objection to jurisdiction based upon immunity from suit under the Eleventh Amendment and consents to the present suit. *Port Authority Trans-Hudson Corp. v. Feerey*, 495 U.S. 299 (1990).

B. The Relationship Between State Law and Indian Gaming

1. Regulatory and Prohibitory State Laws: the Cabazon Public Policy Test

This dispute represents a new phase in the ongoing relationship between the Tribes and the State of California concerning Indian gaming. Prior to 1982, the Cabazon and Morongo [sic] Bands of Mission Indians began operating bingo games on tribal property.[6] The State challenged the Indian's operation of the bingo games claiming that the games violated California Penal Code § 326.5. The Indians agreed that their bingo games violated requirements in § 326.5 that such games be operated and staffed by unpaid members of designated charitable organizations and award prizes not exceeding $250 per game. The Indians asserted, however, that the state laws and county ordinances were inapplicable to bingo games operated on tribal lands. *Cabazon*, 480 U.S. 202. Accordingly, the tribes sought declaratory relief in federal court when California insisted that they comply with the State's bingo laws.

The Supreme Court recognized at the outset that under Public Law 280, California had been granted comprehensive criminal jurisdiction over offenses committed by or against Indians within Indian country in California.

---

[6] All references to tribal property or tribal gaming activities shall refer to property and gaming activities within the State of California.

18 U.S.C. § 1162.[7] However, the statute granted California only limited civil jurisdiction over Indians and their land. 28 U.S.C. § 1360(a), § 4 of Public Law 280.[8] Accordingly, the Court observed:

> when a State seeks to enforce a law within an Indian reservation under the authority of Public Law 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

---

[7] 18 U.S.C. § 1162(a) provides:

> [California] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that [it] . . . has jurisdiction over offenses committed elsewhere within the State . . . and the criminal laws of [California] . . . shall have the same force and effect within such Indian country as they have elsewhere within the State. . . .

[8] Section 4(a) of Public Law 280, codified as 28 U.S.C. § 1360(a) provides:

> [California] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

*Cabazon v. California*, 480 U.S. at 210 (quoting *Bryan v. Itasca County*, 426 U.S. 373, 385, 388-90 (1976)).[9]

In *Cabazon*, the Supreme Court warned that the crucial determination of whether a law is criminal or civil in nature must depend upon more than merely assessing whether the law imposes a criminal penalty. Rather, the proper test is whether the conduct proscribed by the law "violates the State's public policy." *Id.* at 209. Public policy must be approached as a global concept and, accordingly, any inquiry into the nature of a particular state law must extend beyond the confines of the law's own provisions. "In an inquiry such as this we must examine more than the label itself to determine the intent

---

[9] In *Cabazon*, the Court rejected California's arguments that Public Law 280, codified at 18 U.S.C. § 1162, and the Organized Crime Control Act (OCCA), both of which incorporate certain state law into federal law, enabled the State to apply its laws to prohibit tribal bingo enterprises. *California v. Cabazon*, 480 U.S. at 213. Likewise in this case, the State renews its claim that Public Law 280 makes California gaming law enforceable and further contends that 18 U.S.C. § 1166(a) makes California's gaming laws applicable to Indian gaming. Both claims are meritless. Public Law 280 only applies a state's criminal/prohibitory laws to Indian lands. *See infra*, The Proposed Games at pages 15-24 for analysis of the relevant California laws under *Cabazon* and IGRA. Section 1166 does make State laws pertaining to the licensing, regulation or prohibition of gambling applicable in Indian country but its definition of "gambling" *excludes* Class III gaming conducted under a Tribal-State compact. 18 U.S.C. § 1166(c)(2). Thus federal criminal law exempts the proposed gaming activities from applicable State criminal laws, if they are conducted pursuant to a Tribal-State compact under IGRA.

of the State and the nature of the statute." *Quechan Indian Tribe v. McMullen*, 984 F.2d 304, 307 (9th Cir. 1993).

A state's public policy must be gleaned from the totality of the laws enacted by the state affecting the conduct in issue. If the totality of state law manifests an intent to prohibit certain conduct, then such conduct violates its public policy. Conversely, if state law generally permits the conduct, notwithstanding exceptions, the conduct does not violate its public policy. In the latter instance, the state law is regulatory and not prohibitory.

> Concern for protecting Indian sovereignty from state interference prompted courts to develop the criminal/prohibitory – civil regulatory test. That concern leads us to resolve any doubts about the statute's purpose in favor of the Indians.

*Confederate Tribes v. State of Wash.*, 938 F.2d 146, 149 (9th Cir. 1991).

Assessing a State's public policy and whether it prohibits certain conduct is a subtle process not subject to a bright-line rule. *Cabazon*, 480 U.S. at 210. Under *Cabazon*, determining whether a particular state statute is criminal/prohibitory or civil/regulatory in nature involves a two step process: (1) identifying the conduct prohibited by the statute and (2) ascertaining the state's public policy in connection with that conduct. This second step focuses on whether

> the prohibited activity is a small subset or facet of a larger, permitted activity – high-stakes unregulated bingo compared to all bingo games – or whether all but a small subset of a basic activity is prohibited.

*Confederate Tribes*, 938 F.2d at 149. It is the second task which is most pivotal and most arduous.

The *Cabazon* decision affords valuable guidance for defining California's public policy as the issues confronting the Court were closely related to those involved in this case. Employing the public policy test, the Supreme Court in *Cabazon* endeavored to ascertain California's public policy as it related to bingo gaming. Despite the fact that the Indian's bingo operation violated a Penal Code section, the Court pursued a broader perspective, observing:

> [B]ingo is legally sponsored by many different organizations and is widely played in California. There is no effort to forbid the playing of bingo by any member of the public over the age of 18.

*Cabazon*, 480 U.S. at 211. The Court also noted that "California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery." *Id.*

Based on the foregoing, the Cabazon Court concluded that the State's public policy permits bingo playing as "California regulates rather than prohibits gambling in general and bingo in particular." *Id.* The Court held that the Indian's bingo gaming operation was not contrary to public policy, despite its violation of Penal Code § 326.5. Under California's public policy, the statute violated by the Indian's bingo operation was civil/regulatory, not criminal/prohibitory, and did not apply on Indian land.

2. IGRA

In the wake of the *Cabazon* decision, Congress passed the Indian Gaming Regulatory Act ("IGRA") in 1988. Congress explicitly recognized in the opening text of IGRA that:

> (1) numerous Indian tribes [had] become engaged in or [had] licensed gaming activities on Indian lands as a means of generating tribal governmental revenue; . . .
>
> (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
>
> (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
>
> (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.[10]

25 U.S.C. § 2701.

The underlying intent of IGRA is to provide a statutory framework for:

---

[10] The last item effectively incorporates the Supreme Court's decision in *Cabazon* into the statute.

> (1) the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; and . . .
>
> (2) the regulation of gaming by an Indian tribe to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players;. . . .

25 U.S.C. § 2702.

IGRA divides gaming into three classes. Class I gaming "means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Indian tribes have exclusive jurisdiction to regulate Class I gaming. 25 U.S.C. § 2710(a)(1).

Class II gaming means "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and card games that (I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State," provided those card games are played under the state laws and regulations regarding hours of operation and wager or pot size limitations. 25 U.S.C. § 2703(7). The tribes also have jurisdiction over Class II gaming, subject to the express

requirements of IGRA and the oversight of the National Indian Gaming Commission. 25 U.S.C. § 2710(b).[11]

Class III gaming includes all forms of gaming that are not Class I or II gaming. 25 U.S.C. § 2703(8). The parties agree that the games in dispute here are Class III games. Class III gaming may only be conducted on tribal lands if it is (A) authorized by an approved Tribal ordinance or resolution, (B) located in a State that permits such gaming **for any purpose by any person, organization or entity,** and (C) conducted in conformance with a Tribal-State compact between the Indian tribe and the state. 25 U.S.C. § 2710(d)(1) (emphasis added).

A tribe wishing to conduct Class III gaming upon its lands must "request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). Upon such a request, the state must negotiate with the Indian tribe in good faith. *Id.*[12]

---

[11] IGRA permits Class II gaming only if it is conducted "within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by federal law)." 25 U.S.C. § 2710(b)(1)(A). The statute also limits the uses of gaming revenues, provides for outside audits of gaming and contracts for supplies or services, requires that gaming be conducted in a safe manner, and requires background checks of management and key employees.

[12] Plaintiffs assert *Cabazon*'s determination that California regulates rather than prohibits gambling in general is entitled to issue preclusion effect in this case. The cases do involve the

The Senate Report accompanying IGRA's passage provided the following guidance to courts construing the phrase "located within a State that permits such gaming for any purpose by any person, organization, or entity" in IGRA:

> [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether [Class III][13] games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*.

---

same defendant, as well as some of the same plaintiffs, but that is not enough for issue preclusion to apply.

Relitigation of issues is precluded only if the second case reaches issues "actually litigated and necessarily decided in prior proceedings." *Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1442 (9th Cir. 1990). The *Cabazon* Court found California's gaming laws in general to be regulatory, precluding relitigation of this issue. However, *Cabazon* directed courts to examine "applicable state laws[ ] in detail before they can be characterized as regulatory or prohibitory." 408 U.S. at 211 n.10. *Cabazon* examined California's bingo laws while California's statutes relating to electronic games of chance and banked and percentage card games are at issue in this case. Therefore the issue whether California's laws prohibiting the proposed games are criminal or regulatory is not precluded.

[13] The Senate Report was specifically referring to this phrase as found at 25 U.S.C. § 2710(b)(1)(A) regarding Class II gaming. However, this legislative history is "instructive with respect to the meaning of the identical language in section 2710(d)(1)(B), regarding Class III gaming." *Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024, 1030 (2d Cir. 1990); *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990).

S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3076. This passage from the Senate Report, in conjunction with the express language of section 2701(5),[14] makes it clear that Congress intended IGRA to incorporate and be applied consistently with *Cabazon*. Thus, Congress incorporated the *Cabazon* criminal/prohibitory-civil/regulatory analysis into IGRA.

3. IGRA and *Cabazon* Apply Conjunctively

The combined effect of IGRA and *Cabazon* is that a two step analysis must be used to determine whether the proposed Class III games are the proper subject of a Tribal-State compact. First, the court must ascertain whether the state permits each proposed game to be played "for any purpose by any person." If a game is permitted, then the plain language of IGRA establishes that the game is the proper subject of a Tribal-State compact. This effect of IGRA is premised on the notion that if the proposed Class III game is permitted by the state to be played for any purpose by any person, the game does not violate the state's public policy.

In the case where a proposed game has not been permitted by the state, the court must proceed to the second step of its analysis. In such instance, Congress has directed the courts to employ the *Cabazon* analysis to determine whether the proposed game violates the state's public policy. Under *Cabazon*, the court must ascertain the state's public policy as it relates to the gaming activity by examining the state's entire statutory scheme. If the

---

[14] See text of 25 U.S.C. § 2701(5). *See supra* pp. 10-11.

state's public policy, as determined from the totality of its laws, does not prohibit the game, then the game is the proper subject of a Tribal-State compact. This remains true notwithstanding any particular law of the state which, under *Cabazon*, regulates rather than prohibits the game. Conversely, when the state's public policy prohibits the proposed game, the Class III game cannot lawfully be operated on Indian lands within the state.

The effect of IGRA is simply to provide a shortened application of the *Cabazon* rule where a game is found to be played within a state. In such instance, no further analysis is necessary to find the game is proper for a Tribal-State compact. In every other case, however, *Cabazon* retains its full vitality and a game will only be prohibited on Indian lands if it violates the state's public policy.

C. The Proposed Games

At the outset this court must identify the conduct in issue. As described above, the Tribes seek to operate several new games within the Class III description of IGRA.[15] The new games may be divided into two distinct groups: electronic games and card games.[16]

---

[15] Class III designation simply establishes that the games are not Class I or Class II games. This characterization has no particular descriptive value and serves only to indicate which IGRA provisions are applicable. Under IGRA, Class III games may only be played on Indian lands if the three conditions stated in 25 U.S.C. § 2710(d)(1) are satisfied.

[16] At the outset, the court must decide whether, under IGRA and *Cabazon*, Class III games are considered collectively

1. Electronic Games

Each of the electronic games in this category involves a machine or video terminal used to play games which the State otherwise permits. The State argues that the use of electronic gaming devices to play such games violates California's prohibition against "slot machines." Cal. Penal Code §§ 330, 330a, and 330b.[17] Plaintiffs contend

---

or individually when determining whether they are an appropriate subject of a Tribal-State compact. Plaintiffs argue that if California permits *any* Class III games to be played, all Class III games should be negotiable in a Tribal-State compact. The State contends that Class III is "less a category than a residuum" and urges an activity by activity analysis. Class III includes a wide variety of games and legislative history and prior cases demonstrate that the "activity" is not to be too narrowly defined. Courts which have applied the *Cabazon* prohibitory/regulatory distinction have conducted a broad review of the state's gaming laws but are careful to examine the specific gaming activity which has been proposed. *See Mashantucket Pequot Tribe*, 913 F.2d at 1032; *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 368. This court has found no authority for the proposition that a state's public policy construed as permitting a single Class III game must be found to permit all Class III gaming activities. Accordingly, this court adopts the method of review used by other courts, mindful that *Cabazon* found that California's gaming laws in general are regulatory.

[17] The California Penal Code defines a slot machine as "a machine that is adapted . . . for use in such a way that, as a result of the insertion of any piece of money or coin or other object, or *by any other means*, such machine or device *is caused to* operate or *may be operated*, and by reason of any element of hazard or chance or of other outcome of such operation unpredictable by him, the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value or additional chance or right to use such slot machine or device, or any check, slug, token or memorandum, whether of value or otherwise,

that the electronic games they propose are indistinguishable from the video lottery terminals operated by the California State Lottery and permitted punchboards, and therefore are games that the State permits to be played by any person for any purpose. Plaintiffs claim that they are entitled to play the electronic games on Indian lands regardless of whether the equipment used may be deemed illegal slot machines so long as the State sponsors an identical type of game.[18]

In this case it is not the rules or type of play associated with the proposed electronic games that is the focus of their controversy. Rather it is the use of electronic equipment to play the games. The court's first task is to determine whether California permits games to be played with electronic equipment by any person for any purpose. In the event that the State permits games to be played using electronic equipment, by any person for any purpose, then the Tribes' operation of games using similar equipment is a proper subject for a Tribal-State compact. 25 U.S.C. § 2710(d)(1)(B).

---

which may be exchanged for any money, credit, allowance or thing of value, or which may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication of weight, entertainment or other thing of value." Cal. Penal Code § 330b(2).

[18] The Tribes, therefore, have agreed with the State to assume for the purposes of these proceedings that the devices are "slot machines" as defined by California Penal Code § 330b(2). In California, it is a misdemeanor to manufacture, repair, own, possess, transport or permit the operation of a slot machine. Cal. Penal Code § 330b(1).

If the games are not permitted by the State to be played with electronic equipment, the court proceeds to determine whether Penal Code § 330(b) is criminal/prohibitory or civil/regulatory in nature by ascertaining California's public policy regarding the use of electronic gaming devices. If the use of electronic gaming equipment violates California's public policy, then § 330(b) must be construed as criminal/prohibitory in nature and applicable to the Indian's operations. Conversely, if public policy does not preclude the use of such equipment, § 330(b) must be regulatory in nature and inapplicable to Indian gaming.

As the Tribes point out, the State has authorized the State Lottery to operate electronic games virtually identical to the electronic games requested by the Tribes.[19] Moreover, from the record, it appears that equipment similar if not identical to that proposed by the Tribes is currently employed by the State in its electronic gaming operations. Given the express purposes and intent of IGRA to facilitate Indian revenue generation and governmental autonomy, the Tribes should not be deprived of the opportunity to enhance their gaming operation and

---

[19] The State argues that the video lottery terminals are distinct from electronic games because the electronic machine which records numbers for the player is different from the central computer at lottery headquarters which selects the winning numbers and transmits them to the video lottery terminals. It argues that the draw of the winning numbers is not "activated" by the lottery terminal, but by the central computer. This distinction is not significant from the player's perspective. Moreover, from a regulatory standpoint, the same controls are relevant to assure that the winning numbers are randomly drawn whether they are drawn locally or by a central computer.

revenues in the same manner, and with the same modern equipment, that the State has used to enhance its operations. IGRA expressly precludes such result and requires that the use of electronic equipment on the Tribes' lands be held a proper subject for a Tribal-State compact.[20]

2. Banking and Percentage Card Games

The Tribes propose to operate banking and percentage card games. The State contends that these card games are prohibited by Cal. Penal Code § 330 and violate California's public policy against casino games. The Tribes do not dispute the State's point that it does not permit banking or percentage card games, but contend that other types of banking and percentage games as well as various card games are played within the State. As a result, the Tribes assert, banking and percentage *card* games do not violate the State's public policy.

Following the analysis required by IGRA and *Cabazon*, the first inquiry is whether the State permits banking or percentage card games to be played for any purpose by any person. If so, under IGRA, the proposed games are a proper subject for negotiation of a Tribal-State compact. If banking and percentage card games are

---

[20] The State attempts to avoid this result by arguing that the State Lottery video terminals are not "slot machines." *See infra* note 18. Although this court does not reach that question, due to the substantial similarities between the State's equipment and the Tribes' proposed equipment, to the extent the State is correct, the Tribes would be entitled to use the same equipment in their gaming operation since the "slot machines" prohibition would not apply.

not permitted in California, the court must follow *Cabazon* and ascertain the State's public policy regarding the operation of such games.

Under *Cabazon*, the proposed games violate California's public policy and the Tribes may not negotiate a Tribal-State compact to operate them, if the intent of the State's laws is to prohibit them. *Cabazon*, 480 U.S. at 210. Conversely, the proposed games do not violate the State's public policy if the court finds that the State's laws regarding banking and percentage card games permit the games. *Id.* In such case, the parties could negotiate a Tribal-State compact permitting the Indians to operate banking and percentage card games.

a. Whether the State Permits Banking or Percentage Card Games

The Tribes contend that California permits many banking and percentage games. For example, the Tribes assert that the State Lottery's games which have fixed prizes are banking games since the State Lottery cannot know how much prize money it will have to pay out for any given "play" involving fixed prizes. Such uncertainty typifies banking games. Although the State urges that payments are made from an accumulation of player's money, the fact remains that a fixed prize game with a potentially unlimited number of winners is fundamentally a banking game.[21]

---

[21] In the State Lottery games players receive or select numbers or symbols which they hope will "win" by matching or exceeding the "bank's" random draw. The "bank" uses the

Similarly, it is not difficult to find that many percentage games are played in California. The State Lottery's main games are percentage games, where the pot is based upon the receipts from players, less certain percentages for education and administrative costs. Moreover, California's horse racing industry operates percentage gaming. Cal. Bus. § Prof.Code § 19610 (requiring horse racing associations to deduct a set percentage of the total amount wagered).

Although many banking and percentage games are played in California, banking or percentage *card* games are not permitted by the State. To the contrary, California specifically prohibits banking or percentage card games, even in the State licensed card rooms. *See generally Sullivan*, 189 Cal. App. 3d at 683. Accordingly, the Tribes' request to operate such games does not pass the test specified in IGRA as California does not permit banking or percentage card games to be played by any person for any purpose.

---

player's wagers to cover the wins of other players, to the extent they are available. The "bank" remains obligated to pay all winners, however, even if the payout to winners exceeds the wagers of the other players. Thus, the "bank" has the potential of paying its own funds to cover the winnings of the players.

The State is in the unique position of operating games having many, many participants, which fact reduces the statistical risk that any one "play" will require a payout exceeding the intake from the individual game. Moreover, the State Lottery retains adequate reserves from prior game revenues. These facts do not change the fundamental gaming principles involved.

b. Whether Banking and Percentage Card Games Violate California's Public Policy

The second step of the analysis is determining whether banking and percentage card games violate California's public policy. The Tribes assert that since the State permits so many banking and percentage games, banking and percentage card games could not violate the State's public policy. The State contends that the statutory prohibition of banking and percentage games and the prohibition of traditional casino games illustrate the State's public policy against the card version of such games.

(1) The Public Policy Prohibiting Commercial Gambling

The State's public policy against banking and percentage games can be understood by examining the State's intent underlying the relevant laws. *Cabazon*, 480 U.S. at 210. California prohibits banking or percentage games played with cards, dice, or any device, for money or other representative of value. Cal. Penal Code § 330. Banking games are games in which the "house" or "bank" is a participant in the game, taking on all comers, paying all winners and collecting from all losers. *Sullivan v. Fox*, 189 Cal. App. 3d 673, 678 (1987). The "house" or "bank" has an interest in the outcome of banking games as its profits increase when the "house" wins the game.

In contrast, percentage games are games in which the house takes a percentage of the amount wagered, the amount won, or the money changing hands. *Id.* at 679.

The house has no stake in the outcome of a percentage game, but benefits from an increased volume of play. Banking and percentage games are defined so that when combined, all potential forms of commercial gambling, or gambling which generates revenue, are prohibited. *Id.* However, California permits gaming wherein the operator rents a game table or seats, or collects a flat fee from players. Under these circumstances, the operator neither enters into play nor has an interest in the game or the volume of gaming. *Id.* at 683.

Despite the statutory prohibition of banking and percentage games, the State both permits and sponsors such games. The State permits parimutuel horse race wagering in California and also permits off-track or satellite horse race wagering. Cal. Const. Art. 4, § 19(b); Cal. Bus. & Prof. Code § 19411, 19605. Moreover, California's State Lottery includes both banking and percentage games, as discussed above. In addition, California permits the playing of card games in several hundred private establishments, provided that the operator does not participate as a player and the establishment has no interest in the outcome.

Since California engages in and permits commercial banking and percentage wagering operations, it cannot establish that banking and percentage games violate its public policy. Its statutory prohibition must, therefore, be deemed civil/regulatory rather than criminal/prohibitory, notwithstanding the unconditional prohibitory language of the statute. Moreover, the fact that the proposed banking and percentage games are played with cards, does not violate any apparent public policy in California.

California permits several hundred card rooms, indicating that California's public policy does not oppose the activity of playing cards. Thus, California's statute prohibiting commercial wagering does not establish a public policy precluding commercial card game wagering.

(2) The Public Policy Prohibiting Casino Gaming

The State further argues that it's public policy prohibiting casino gambling prohibits the proposed banking and percentage card games. The State points to a Constitutional provision added by voter initiative in 1984 which provides as follows:

> (e) The Legislature has no power to authorize, and shall prohibit casinos of the types currently operating in Nevada and New Jersey.

Art. 4, § 19(e).[22] The State's public policy regarding casino gambling is also revealed in a statute restricting the State Lottery from sponsoring games utilizing certain traditional casino themes, including roulette, dice, baccarat, blackjack, Lucky 7's, draw poker, slot machines and dog or horse racing. Cal. Gov't Code § 8880.28(a). Moreover, certain traditional casino card games may not be played in California, even in its card rooms. Cal. Penal

---

[22] Unfortunately, the State provides no explanation or definition of the critical phrase "casinos of the types currently operating in Nevada and New Jersey." The State asserts, without factual support, that the gambling and devices prohibited by Penal Code § 330, 330a and 330b are commonly understood to be casino games and are in fact conducted in casinos in Nevada and New Jersey.

Code § 330. These sources reveal a California public policy prohibiting traditional casino gambling.

Banking or percentage card games using traditional casino game themes would clearly violate California's public policy against casino gaming.[23] These games would include blackjack and poker[24] as played in traditional casinos. Whether commercial wagering on other card games would also violate California's public policy is unclear, without a greater description of those games. The parties must negotiate their differences over the remaining banking and percentage card games through the Tribal-State compacting process. Such negotiations are part of the procedural framework established by Congress to address the differing interests at issue here.

---

[23] Another potential public policy concern is that casinos offer a collection of games under one roof. Plaintiffs responded in oral argument that California currently permits multiple games to be played under one roof. For instance, they assert California currently permits a card room at a parimutuel horse racing track. The issue before the court, however, is what types of games may be included in a Tribal-State compact. The number of different games and gaming devices permitted under one roof should be determined through the negotiation of a Tribal-State compact. 25 U.S.C. § 2710(3)(C).

[24] Poker can be played as either a Class II or Class III game. However only Class III banking and percentage card games are in issue in this case. Therefore all subsequent references to poker shall mean the Class III banking or percentage version of the game.

D. Tenth Amendment

The State argues that IGRA violates the Tenth Amendment by imposing an impermissible mandate on the States to negotiate with Indian tribes over how gaming activity allowed on Indian lands located within that State's borders may be conducted.[25]

The Supreme Court recently restated the limits imposed by the Tenth Amendment on Congress' power to direct or otherwise motivate the States to regulate in a particular way. *New York v. United States*, 112 S. Ct. 2409, 2414 (1992). The Court acknowledged that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 2423. Congress' power to regulate or prohibit certain actions does not give Congress power to compel the States to regulate or prohibit the same actions. *Id.*

This limitation, however, does not restrict Congress from offering incentives to encourage States to act in certain ways. These incentives must involve a choice. For example, Congress may offer States the choice of regulating an activity according to federal standards or having state law pre-empted. *Id.*; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981) (federal statute did not compel states to enforce federal standards,

---

[25] Assuming, *arguendo*, that IGRA was found to be unconstitutional under the Tenth Amendment, the State would still be confronted by the Tribe's request to operate the proposed games. Moreover, without IGRA, *Cabazon* holds that the Tribes would be able to operate those games which do not violate the State's public policy. The result the court reaches in this decision would not change under a pure *Cabazon* analysis.

expend state funds or participate in federal regulatory program where federal government assumed the full regulatory burden if states chose not to comply).[26] "However, a choice between two unconstitutionally coercive regulatory techniques is no choice at all." *New York*, 112 S. Ct. at 2428; *Board of Natural Resources of the State of Washington v. Brown*, 992 F.2d 937 (9th Cir. 1993) (invalidating a federal statute which presents an alternative which Congress has no authority to command).

Turning to IGRA, the State argues that the plain language of the statute exhibits an unconstitutional mandate that the State negotiate with the tribes to reach a compact. Courts which have found that IGRA violates the Tenth Amendment have construed this requirement to negotiate in good faith as foreclosing the State from refusing to act.[27] This construction of the statute is only required if the mandatory language is read without considering the language and design of the statute as a whole.

Under statutory rules of construction, "[w]here an otherwise acceptable construction of a statute would raise

---

[26] The rationale is that the state officials must remain free to act in accordance with and be accountable to the best interests of the citizens of the state. *New York*, 112 S. Ct. at 2424 and 2427.

[27] *Confederated Tribes v. Washington*, CIV-92-988-T, E.D. Wa. (June 3, 1993), *Pueblo of Sandia v. New Mexico*, CIV No. 92-0613 JC, D. N.M. (November 3, 1992), *Ponca Tribe of Oklahoma v. Oklahoma*, CIV No. 92-9888T, W.D. OK (September 9, 1992). *Contra Yavapai-Prescott Indian Tribes v. State of Ariz.*, 796 F. Supp. 1292, 1297 (D. Ariz. 1992) (concluding that IGRA does not violate the Tenth Amendment).

serious constitutional problems, the court [should] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *New York*, 112 S. Ct. at 2425. This rule of statutory construction favors declination of the State's invitation to construe the negotiation requirement as an unconstitutional command.

Construing the statute as a whole reveals that the process of negotiating a compact does not require a state to assume any responsibility for regulating. Three levels of analysis support this conclusion. First, the plain language mandates the State to negotiate rather than regulate. Second, the Congressional intent and purpose of IGRA as a whole emphasize that the relationship between the State and the Tribes is that of two sovereign entities cooperating to reconcile potentially competing interests, but remaining subject to federal regulation and authority. Finally, the legislative history further illustrates Congress' intent in enacting the statute was "to provide a statutory basis for operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2701(4).

1. The Mandate to Negotiate

The first distinction between IGRA's mandate to the states and Tenth Amendment precedents is that IGRA does not coerce any state to *regulate* Indian gaming activities, but only to *negotiate* with the Tribes over what regulations would best protect the state's interests as a

neighboring sovereign.[28] *Negotiating* the compact does not implicitly require the State to *regulate* the gaming activities. However, a state may negotiate for those regulatory controls which it believes must be undertaken to protect its interests. 25 U.S.C. § 2710(d)(3)(C). The negotiations are simply a method by which states and Indian tribes may share their concerns and express opinions, as they seek to reach a compact designed to address the concerns of both. The negotiating process might facilitate the elimination of some areas of disagreement between the State and the Tribes as to what Class III gaming could

---

[28] 25 U.S.C. § 2710(d)(3)(C) provides that the Tribal-State compact may include provisions relating to:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

be conducted under a compact and under what conditions the games would be operated. There is no compulsion inherent in this process, direct or implicit, that the State regulate. The eventual compact, rather than the negotiations, prescribes the regulatory scheme.

Through IGRA's compact negotiating process, Congress created a procedure whereby each state may negotiate for the extension of its civil/regulatory laws onto Indian lands within its borders.[29] Without a compact, the Tribes may not conduct Class III gaming unless the Secretary of the Interior prescribes procedures or gaming regulations pursuant to § 2710(d)(7)(B)(vii)(I)-(II). *Yavapai-Prescott Indian Tribe*, 796 F. Supp. 1292, 1296-1298 (D. Ariz. 1992). Conversely, the State may not enforce its civil/regulatory laws on Indian lands, except through the mechanism of a Tribal-State compact. *See* 25 U.S.C. § 2710(d)(5). Thus, IGRA offers the State an opportunity to influence federal regulation of Indian gaming which it would not otherwise have, but requires that the State exercise that influence through the compact negotiating process. This is distinct from the Congress's coercion of States to enact and enforce a federal regulatory program

---

[29] Federal law rather than State law governs the determination of what Class III games may be negotiated in a Tribal-State compact. The State has negotiated for compacts governing other games without asserting that the mandate to negotiate violates its Tenth Amendment rights. The State's primary opposition to the proposed games is that they are "unlawful" in California. However, whether a Class III game may be played *on Indian lands* within California is purely an issue of federal rather than State law.

which has previously been found to violate the Tenth Amendment. *Board of Natural Resouces*, 992 F.2d at 947.

2. IGRA's Statutory Scheme as a Whole

We discern the plain meaning of a statute by looking "to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1341 (9th Cir. 1990). Construing IGRA in its entirety reveals that its requirement that a State negotiate for a Tribal-State compact does not use the states as implements of regulation in violation of the Tenth Amendment. *See Board of Natural Resources*, 992 F.2d at 946.

The Congressional findings codified in IGRA provide that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). This federalization of each state's public policy on gaming activity authorized on Indian lands appears to have been important to the Congressional balancing of the various interests implicated by Indian gaming. In its codified findings, Congress also expressly finds that "a principal goal of Federal Indian policy is to promote tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). Moreover, IGRA declares its purpose is to "provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences . . . " 25 U.S.C. § 2701(2).

A state's only potential role in this entire scheme involves negotiating in good faith for a Tribal-State compact governing Class III gaming. 25 U.S.C. § 2710(d)(3). Failing to negotiate in good faith subjects a state to a potential finding by a federal court that the state failed to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(A) and (B). The court may then order the state to conclude a compact within 60 days. *Id.* If a compact is not reached in those 60 days, the tribe and the state must each submit their last best offer for a compact to a court-appointed mediator. *Id.* The state then has 60 days to choose whether to consent to this compact. *Id.* If the state does not approve the proposed compact, the Secretary shall prescribe procedures under which class III gaming may be conducted on "the Indian lands over which the Indian tribe has jurisdiction." *Id.* If the Secretary prescribes such procedures, the Secretary then has the right to enforce those procedures in federal court. *Id.*

Examining this process reveals that the requirement that the state negotiate need not be construed in a strictly mandatory sense. If the state takes no action, it does not incur a penalty. Nor does the statute effect a coercion upon states who elect not to participate. Failing the state's participation, the Secretary of the Interior prescribes procedures under which the tribe may operate Class III gaming on a tribe-by-tribe basis. If the state *either* chooses not to participate or the tribe and state do not agree on the terms of a compact, the federal government retains final authority to regulate Class III gaming.

This conclusion is strengthened when the statutory negotiating process is examined in the context of federal Indian policy. State criminal law is only applicable on

Indian lands within its borders if federal law expressly incorporates the state law. *Cabazon*, 480 U.S. at 208. Federal law does not incorporate state civil/regulatory law. Moreover, federal law incorporates only those state criminal laws which are deemed "criminal/prohibitory" after examining the state's public policy relating to the specific conduct. *Id.* at 210.

When selecting the compact negotiating process, rather than a federal regulatory scheme, Congress implicitly attempted to use a "local approach" permitting Class III gaming to evolve as each state's gaming policy changes. The compacting process permits the state and tribe the greatest opportunity to create a mutually-satisfactory regulatory scheme. Failing agreement, however, the federal government, and not the state, assumes the full burden of regulating. 25 U.S.C. § 2710(d)(7)(vii) (providing that the Secretary of the Interior, in consultation with the Indian tribe, shall proscribe the procedures under which Class III gaming may be conducted on the Indian lands).

The State next argues that many Indian tribes are not capable of regulating Class III gaming at this time and that Congress recognized states were the governmental unit most likely to have an appropriate, existing regulatory scheme. States are coerced into regulating, the State argues, to prevent a vacuum of federal regulation.

The federal government's *failure* to regulate, even if true, does not violate the Tenth Amendment. Tenth Amendment concerns arise only when the state is forced to choose between regulating consistently with federal policy or facing a consequence the federal government

has no constitutional authority to impose. *See New York*, 112 S. Ct. at 2428. In this case, the state need not make such a choice. The state is not *permitted* to regulate without the tribes' consent and the state faces no consequence, other than loosing [sic] the opportunity to influence how Indian gaming is regulated within its borders. The coercion the State complains of, therefore, does not arise from a violation of the Tenth Amendment.

3. IGRA's Legislative History

Although it may be unnecessary to conduct further inquiry, the legislative history of IGRA affirms that IGRA does not permit or coerce the state to regulate Indian gaming in violation of the Tenth Amendment. IGRA gives States the unique opportunity to participate in the civil regulation of Indian gaming, recognizing that both the tribe and state have legitimate interests in the manner in which Class III gaming is conducted. *See* S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3083-84. "[C]ongress clearly was cognizant of the Tenth Amendment when it acknowledged that a State need not forgo any State governmental rights to engage in or regulate Class III gaming except whatever it may voluntarily cede to a tribe under a compact." *Yavapai-Prescott Indian Tribe*, 796 F. Supp. at 1297; S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3083-84.

The legislative history shows that Congress extended to the states a unique *opportunity* to acquire jurisdiction over Indian lands that states do not otherwise have. In creating this mutually beneficial opportunity for the states and tribes, the Senate Indian Affairs Committee

noted the "strong concerns of states" that their laws and regulations be respected on Indian lands although such laws and regulations did not apply before IGRA. On the other hand, the Committee recognized the strong tribal opposition to any imposition of State jurisdiction over Indian lands. "The Committee concluded that the compact process is a viable mechanism for settling various matters between *two equal sovereigns*. S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3083 (emphasis added). This opportunity was not intended to give states the power to effectively veto the tribes' attempt to engage in Class III gaming simply by refusing to participate in the Tribal-State compacting process.

> Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws . . . and state jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities. . . . This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied.

S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3083-84.

Accordingly, the plain language of IGRA's mandate to negotiate, the statutory context of the mandate, and IGRA's legislative history each refute the State's assertion that IGRA coerces the State to regulate Indian gaming in violation of the Tenth Amendment.

## CONCLUSION

For the reasons discussed above, the court declares that the proposed electronic games are a proper subject of negotiation in a Tribal-State compact. In addition, the Tribes and the State should negotiate to determine whether banking and percentage card games other than blackjack, poker (when played as a banking or percentage game) and other traditional casino card games, will be permitted under a Tribal-State compact. Finally, the mandate that the State negotiate a Tribal-State compact in good faith does not violate the Tenth Amendment.

IT IS SO ORDERED.

DATED: July 20, 1993

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF CALIFORNIA**

**JUDGMENT IN A CIVIL CASE**

RUMSEY INDIANS, et al

v. CASE NUMBER: CIV S-92-812 GEB

WILSON, et al (Filed Jul. 29, 1993)

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S AMENDED ORDER OF 7/20/93.**

Jack L. Wagner,
Clerk of the Court

by: /s/ Brian Whalen
B Whalen, Deputy Clerk

ENTERED
July 30, 1993
CLERK U S DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

## APPENDIX D

### 25 U.S.C. § 2701. Congressional findings

The Congress finds that –

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

---

**25 U.S.C. § 2710**

* * *

**(b) Regulation of Class II gaming activity; net revenue allocation; audits; contracts**

**(1)** An Indian Tribe may engage in, or license and regulate, Class II gaming on Indian lands within such Tribe's jurisdiction, if –

> **(A)** such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and
>
> **(B)** the governing body of the Indian Tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian Tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

* * *

**(d) Class III gaming activities; authorization; revocation; Tribal-State compact**

**(1)** Class III gaming activities shall be lawful on Indian lands only if such activities are –

> **(A)** authorized by an ordinance or resolution that –
>
> > **(i)** is adopted by the governing body of the Indian Tribe having jurisdiction over such lands,
> >
> > **(ii)** meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and the State under paragraph (3) that is in effect.

* * *

Supreme Court, U.S.
FILED
JAN 27 1997
CLERK

No. 96-1059

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

---

**SYCUAN BAND OF MISSION INDIANS, et al.,**
*Petitioners,*

v.

**PETE WILSON, Governor of the State of California; and the State of California,**
*Respondents.*

---

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

---

# MEMORANDUM OF NINE RESPONDENT INDIAN TRIBES SUPPORTING POSITION OF PETITIONERS AND SUGGESTING DEFERRAL OF CONSIDERATION OF PETITION*

---

LEVINE & ASSOCIATES
Jerome Levine (Counsel of Record)
Frank R. Lawrence
2049 Century Park East, #710
Los Angeles, CA 90067
Telephone: (310) 553-8400

Attorneys for San Manuel Band of Mission Indians

*The names of the nine respondent Indian tribes and their counsel are listed within.

January 27, 1997

The petition for certiorari, at page ii, lists ten Indian tribes that were parties to the proceedings below but which are not named parties to the petition for certiorari before this Court. These tribes must therefore appear before this Court as respondents pursuant to this Court's Rule 12.6. Nine of the ten tribes join in this memorandum in that capacity.

The nine tribal respondents, and their respective counsel, are as follows: (1) Rumsey Rancheria of Wintun Indians; (2) Table Mountain Rancheria; (3) Cher-ae Heights Indian Community of the Trinidad Rancheria;

DICKSTEIN & MERIN
Howard L. Dickstein
2001 P. Street, Suite 100
Sacramento, CA 95814

(4) San Manuel Band of Mission Indians;

LEVINE & ASSOCIATES
Jerome L. Levine
Frank R. Lawrence
2049 Century Park East, Suite 710
Los Angeles, CA 90067

(5) Viejas Reservation of the Capitan Grande Band of Diegueno Mission Indians;

John Winkelman
5000 Willows Road
Alpine, CA 91901

(6) Hopland Band of Pomo Indians;

RAPPORT & MARSTON
Lester J. Marston
200 West Henry Street
Ukiah, CA 95482

(7) Cabazon Band of Mission Indians; (8) Santa Ynez Band of Chumash Mission Indians;

O'CONNOR, CAVANAGH, ANDERSON
KILLINGSWORTH & BESHEARS
Glenn M. Feldman
One East Camelback Road, Suite 100
Phoenix, AZ 85012-1656

and (9) Barona Group of the Capitan Grande Band of Mission Indians.

Art Bunce
430 North Ceder Street, Suite H
P. O. Box 1416
Escondido, CA 92033

TABLE OF CONTENTS

Page

I. THE RULE 12.6 POSITION OF THE NINE RESPONDENT TRIBES . . . . . 1

II. THE TRIBAL RESPONDENTS SUGGEST THAT THE COURT DEFER CONSIDERATION OF THE PETITION . . . . . 2

III. CONCLUSION . . . . . 7

# TABLE OF AUTHORITIES

Cases — Page

Brownes v. Union Bank of Switzerland,
348 U.S. 948 (1955) . . . . . 2

Lewis v. Licavoli,
400 U.S. 817 (1970) . . . . . 2

Mashantucket Pequot Tribe v. Connecticut,
913 F.2d 1024 (2nd Cir. 1990),
cert. denied 499 U.S. 975 (1991) . . . . . 5

Oklahoma v. New Mexico,
501 U.S. 221 (1991) . . . . . 7

Smith v. United States,
395 U.S. 902 (1969) . . . . . 2

Southern Natural Gas Co. v. Fritz,
489 U.S. 1050 (1989) . . . . . 2

Ticor Title Insurance Co. v. Brown,
511 U.S. 117 (1994) . . . . . 4

U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership,
___ U.S.___, 115 S.Ct. 386 (1994) . . . . . 4

Western Telcon v. California State Lottery,
13 Cal. 4th 475 (1996) . . . . . 3

STATUTES AND REGULATIONS

25 U.S.C. sec. 2710(d)(1)(C) . . . . . 5

25 U.S.C. sec. 2710(d)(3)(C) . . . . . 5

61 Fed. Reg. 58211,
1996 WL 655490 (November 13, 1996) . . . . . 2

MISCELLANEOUS

S. Rep. No. 446, 100th Cong., 2d Sess. 1,13 (1988),
reprinted in 1988 U.S. Code Cong. & Admin.
News 3071, 3083 . . . . . 6

Stern, Gressman, Shapiro & Geller, Supreme Court
Practice, sec. 6.20, pp, 323-25 (7th ed. 1993) . . . . 2

No. 96-1059

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

**SYCUAN BAND OF MISSION INDIANS, et al.,**
*Petitioners,*

v.

**PETE WILSON, Governor of the State of California; and the State of California,**
*Respondents.*

# MEMORANDUM OF NINE RESPONDENT INDIAN TRIBES SUPPORTING POSITION OF PETITIONERS AND SUGGESTING DEFERRAL OF CONSIDERATION OF PETITION*

## MEMORANDUM

### I. THE RULE 12.6 POSITION OF THE NINE RESPONDENT TRIBES.

This case was brought by 16 federally-recognized Indian tribes against the State of California and its Governor under the Indian Gaming Regulatory Act (hereinafter "IGRA"), 25 U.S.C. sections 2701-21. All 16 tribes were parties to the appellate proceedings before the Ninth Circuit, but only six of those tribes filed the petition for certiorari at issue here. The remaining ten tribes did not formally join in that petition, nor are they named as petitioners. Nine of those ten tribes (hereinafter "tribal respondents") accordingly invoke their right

under this Court's Rule 12.6 to be "considered respondents" and to file "a response supporting the petition.[1]

The tribal respondents support the petition for the reasons set forth by the petitioners. In the interest of brevity, those reasons will not be recounted here. The tribal respondents suggest, however, that the Court defer consideration of the petition.

## II. THE TRIBAL RESPONDENTS SUGGEST THAT THE COURT DEFER CONSIDERATION OF THE PETITION.

The tribal respondents suggest that the Court defer consideration of the petition. See generally Southern Natural Gas Co. v. Fritz, 489 U.S. 1050 (1989) (deferring consideration of petition for certiorari); Lewis v. Licavoli, 400 U.S. 817 (1970) (same); Smith v. United States, 395 U.S. 902 (1969) (same); Brownes v. Union Bank of Switzerland, 348 U.S. 948 (1995) (same). Deferral is appropriate because, subsequent to the Ninth Circuit's decision in this case, the State of California and a federally-recognized tribe in California, the Pala Band of Luiseno Mission Indians,[2] have begun meaningful and productive negotiations for a tribal-state compact to govern class III gaming. All 16 tribes in this case, including the six petitioner tribes, fully support these ongoing compact negotiations.

---

[1]See Stern, Gressman, Shapiro & Geller, Supreme Court Practice, sec. 6.20, pp. 323-25 (7th ed. 1993).

[2]See 61 Fed. Reg. 58211, 1996 WL 655490 (November 13, 1996) (listing Pala Band as a federally-recognized tribe). The Pala Band is not a party to this action.

The question of what types of games will be included in a tribal-state compact is at the core of this case, and is the subject of the Ninth Circuit's remand order. See Petitioners' Appendix at 23.[3] The Pala Band initiated these compact negotiations with California, proposing that the negotiations include:

> various types of "lottery games" as that term has been interpreted by the recent decision of the California Supreme Court in Western Telcon v. California State Lottery, [13 Cal. 4th 475 (1996)] as permitted by state law, including the use of on-line computers with video or other electronic displays to conduct lottery games.

Letter from Howard L. Dickstein to Governor Pete Wilson of August 31, 1996, a true and correct copy of which is attached hereto as Appendix 1.[4] The State accepted this proposed negotiation agenda: "The Governor is agreeable to negotiating over any types of lottery games allowable under State law to the full extent required by IGRA." Letter from Daniel M. Kolkey, Legal Affairs Secretary and Counsel to the Governor, to Howard L. Dickstein, dated August 31, 1996, a true and correct copy of which is attached hereto as Appendix 2. Thus

---

[3]The Ninth Circuit's decision remanded to the district court the question of whether the permitted use of video lottery terminals in California obligates the State to negotiate with the tribes for gaming activities proposed in the tribes' complaints. See Petitioners' Appendix at 23. Even if the Court grants certiorari and reaches the merits of the petition, the remand question will nevertheless still need to be litigated in the district court, absent negotiation of a model compact.

[4]Mr. Dickstein is attorney for the Pala Band, as well as for several of the tribal respondents herein.

in addressing "various types of 'lottery games' ... including the use of on-line computers with video or other electronic displays to conduct such lottery games," Appendix 1, these negotiations overlap with the core issue raised by the Tribes' complaints which initiated this action[5]: namely, the types of class III games to be allowed on Indian lands in California. See Rumsey Complaint at para. 19 ("plaintiffs herein have each requested defendants to enter into tribal-state compact negotiations for, inter alia, the following enumerated class III games . . .").

The Pala Band "understand[s] that our negotiations could establish a model compact for use by other gaming Tribes in the State." Appendix 1. The Governor's office has similarly acknowledged that "any resulting compact [may] serve[] as a basis for negotiations with any other Tribes in the State ...." Appendix 2. The fact that these negotiations, if successful, will result in a compact that would serve as a model for other California Tribes, including the tribal respondents and petitioners herein, has significant implications for this case.

If a model compact is successfully negotiated, it would undoubtedly resolve the dispute between California and the tribes over the scope of permissible class III gaming, thereby effectively settling this case and rendering moot any further proceedings here. See U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, ___ U.S. ___, 115 S.Ct. 386, 392 (1994) (recognizing "mootness resulting from settlement"); Ticor Title Ins. Co. v. Brown, 511 U.S. 117, ___ 114 S.Ct. 1359, 1362 (1994) (per curiam) (dismissing writ as improvidently granted where case subsequently settled, rendering petition for certiora-

---

[5]This case began with the filing of four separate, but virtually identical, complaints which the district court consolidated into this action.

ri moot). While it is impossible to predict with certainty when these negotiations will be concluded, to date the sessions have been meaningful and productive. Thus the tribal respondents reasonably expect that the negotiations will come to a timely conclusion before this Court would be able to adjudicate the merits of this case. Deferral for a reasonable period of time, such as until the beginning of the next term of the Court, should therefore provide ample time within which the parties will know whether the negotiations have produced, or are likely to produce, a model compact.

The ongoing existence of these negotiations is a matter of public record, evidenced in part by a press release by the Governor's office, dated October 29, 1996, a true and correct copy of which is reproduced at Appendix 3 hereto. The Governor's office issued this press release in response to the Ninth Circuit's denial of a petition for rehearing in this action, commenting that the appellate court's action would not impact "California's ongoing gaming negotiations with Indian tribes ...." Appendix 3.

For these reasons, the tribal respondents submit that deferring consideration of the petition would conserve this Court's resources by avoiding unnecessary consideration of the petition's merits. Deferral would also conserve the substantial tribal and state resources that otherwise will necessarily be expended on this case, given the importance of the scope-of-gaming issue for hundreds of tribes and dozens of states nationwide. If the petition were to be granted, it can reasonably be expected that many amicus briefs will be filed in this case by other interested parties.

Moreover, deferral would further Congress' preference, codified in IGRA, that class III gaming on Indian lands be conducted pursuant to compacts negotiated by tribes and states. See 25 U.S.C. secs. 2710(d)(1)(C) & 2710(d)(3)(C). Congress established "the compact process ... as the centerpiece of the IGRA's regulation of class III gaming." Mashantucket Pequot

Tribe v. Connecticut, 913 F.2d 1024, 1030-31 (2d Cir. 1990), cert. denied 499 U.S. 975 (1991). As the Second Circuit recognized, "the heart of the ultimate legislative compromise regarding class III gaming," id. at 1030, was the tribal-state negotiation and compacting process described in IGRA's Senate Report:

> After lengthy hearings, negotiations and discussions, the Committee concluded that the use of **compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met** with respect to the regulation of complex gaming enterprises such as pari-mutuel horse and dog racing, casino gaming, jai alai and so forth. The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the State jurisdiction over activities on Indian lands. **The Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns**.

S. Rep. No. 446, 100th Cong., 2d Sess. 1, 13 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3071, 3083 (emphasis added).

In short, IGRA's "whole idea was to foster these [tribal-state] compacts." Petitioners' Appendix at 5 (Canby, J.,

dissenting from denial of rehearing en banc).[6] This congressional preference for tribes and states to negotiate their differences is consistent with this Court's often-stated "preference that, where possible, [sovereigns] ... settle their controversies by mutual accommodation and agreement." Oklahoma v. New Mexico, 501 U.S. 221, 241 (1991) (internal quotations and citations omitted). See also Arizona v. California, 373 U.S. 546, 564 (1963); Colorado v. Kansas, 320 U.S. 383, 392 (1943); Nebraska v. Wyoming, 325 U.S. 589, 616 (1945).

Finally, deferral would promote improved tribal-state relations by allowing the parties to arrive at an allocation of regulatory authority over class III gaming in California through negotiations between sovereigns. The tribal respondents believe that a solution to the long-disputed question of the proper scope of class III gaming on Indian lands in California that is negotiated by tribal and state representatives stands the best chance of surviving the inevitable tests to come and of serving tribal, state, and federal interests in the long term.

## III. CONCLUSION

The tribal respondents, while supporting the petition, accordingly suggest that the Court defer consideration of the petition pending resolution of the on-going tribal-state compact negotiations in the State of California, or alternatively, until the beginning of the next term of the Court.

---

[6]Four active duty Circuit judges dissented from the denial of rehearing en banc in this case. Two senior status Circuit judges also joined in the dissent.

DATED this 27th day of January, 1997.

Respectfully submitted,

LEVINE & ASSOCIATES
Jerome L. Levine (Counsel of Record)
Frank R. Lawrence

Attorneys for Respondent San Manuel Band of Mission Indians

PNN13550

APPENDIX A

LAW OFFICES OF
**DICKSTEIN & MERIN**
ATTORNEYS AT LAW

HOWARD L. DICKSTEIN
MARK E. MERIN
JANE G. ZERBI

August 31, 1996

The Hon. Pete Wilson
Governor of the State of California
State Capitol
Sacramento, CA 95814

Dear Governor Wilson:

Please consider this letter a formal request from our client, the Pala Band of Mission Indians, a federally recognized Indian Tribe, to open negotiations with you immediately for a tribal-state compact under the Indian Gaming Regulatory Act to conduct Class III gaming on our tribal lands. The Pala Band is not currently engaged in any gaming activities.

We propose that our negotiations encompass various types of "lottery games" as that term has been interpreted by the recent decision of the California Supreme Court in Western Telcon v. California State Lottery, as permitted by state law, including the use of on-line computers with video or other electronic displays to conduct such lottery games. We are prepared to discuss reasonable l imitations on the number of such lottery game devices. In addition, we are also

2001 P STREET, SUITE 100, SACRAMENTO, CALIFORNIA 95814□916/443-6911□FAX 916/447-8336

prepared to discuss the location of tribal gaming facilities; compensation for services by local law enforcement agencies; land acquisition issues; environmental impacts; health; safety; security; insurance; gaming integrity; patron complaints; traffic concerns; financial transactions; and other gaming regulatory issues. We understand that our negotiations could establish a model compact for use by other gaming Tribes in the state. Assuming a model compact is developed as a result of these discussions, it should serve as a basis for negotiation available to any federally recognized Tribe in California. We understand your position that such negotiations would be available only for those Tribes which have ceased illegal operations.

In order that these matters of vital interest be resolved, the Tribe urgently requests that negotiations commence in October, 1996. We look forward to your prompt response to this request.

Very truly yours,

DICKSTEIN & MERIN

/s/ Howard Dickstein

Howard Dickstein

HLD:bst

APPENDIX B

[CALIFORNIA STATE SEAL]

GOVERNOR PETE WILSON

August 31, 1996

Howard L. Dickstein
Dickstein & Merin
2001 P Street, Suite 100
Sacramento, CA 95814

Dear Mr. Dickstein:

We have received your letter to the Governor dated August 31, 1996, asking the Governor to open negotiations for a tribal-state compact under the Indian Gaming Regulatory Act ("IGRA") to conduct Class III gaming on the Pala Band's tribal lands. You represent that the Pala Band is not currently engaged in any gaming activities.

You ask that the Governor negotiate over "various types of 'lottery games'" as interpreted by the California Supreme Court in Western Telcon vs California State Lottery. The Governor is agreeable to negotiating over any types of lottery games allowable under State law to the full extent required by IGRA. The Governor is also agreeable to negotiating over the issues which you have raised in the second and third sentences in paragraph 2 of the letter. Finally, the Governor has no objection if any resulting compact serves as a basis for negotiations with any other Tribes in the State, which are not engaged in illegal gaming.

However, the Governor's long-standing position is that he will not negotiate with any Tribe that is engaged in Class III gaming in violation of IGRA. Accordingly, he will not negotiate with any Tribes which are engaged in illegal gaming. Any Tribe engaged in illegal gaming must remove all such games before any negotiations

with it begin. As a result, we will, of course, negotiate with you or any properly authorized representative of the Pala Band.

Since these negotiations may serve as a model compact, please rest assured that they will receive the Governor's close attention.

Very Truly Yours,

/s/ Daniel M. Kolkey

Daniel M. Kolkey
Legal Affairs Secretary and
Counsel to the Governor

STATE CAPITOL • SACRAMENTO, CALIFORNIA 95814 • (916) 445-2841

APPENDIX C

[CALIFORNIA STATE SEAL]

PR96:396

GOVERNOR'S OFFICE

WILSON PRAISES COURT DECISION ON INDIAN GAMING

*State Has No Obligation to Negotiate Over Unlawful Gaming Activities*

FOR IMMEDIATE RELEASE
Tuesday, October 29, 1996

CONTACT: Sean Walsh
Ron Low
916/445-4571

SACRAMENTO - Governor Pete Wilson today praised a decision by the Ninth Circuit Court of Appeals denying a petition for a rehearing in the *Rumsey Indian Rancheria v. Wilson* case. As a result of this decision, in entering gaming compacts with Indian tribes, the State has no obligation to negotiate over any gaming activity that is illegal in California

"The Ninth Circuit's denial of the petition for a rehearing in this case makes it undisputed in California that the Indian Gaming Regulatory Act does not require a state to negotiate over any gaming activity prohibited under state law," said Wilson.

"This decision reinforces California's position against expanding gaming in the State beyond those activities already authorized under state law," said Wilson. "However, we will, of course, continue to comply with our federal obligations to negotiate with Indian tribes over gaming activities which are permitted in California, specifically lottery games and horse racing."

The Ninth Circuit's ruling will not impact California's ongoing gaming negotiations with Indian tribes since the state had been proceeding under the assumption that the Ninth Circuit decision would reaffirm its earlier decision in the State's favor.

-30-

No. 96-1059

Supreme Court, U.S.
FILED
FEB 5 1997
CLERK

In The

# Supreme Court of the United States

October Term, 1996

SYCUAN BAND OF MISSION INDIANS;
MORONGO BAND OF MISSION INDIANS;
SANTA ROSA BAND OF TACHI INDIANS;
CACHIL DEHE BAND OF WINTUN INDIANS
OF THE COLUSA INDIAN COMMUNITY;
SOBOBA BAND OF MISSION INDIANS;
ROBINSON BAND OF POMO INDIANS,

*Petitioners,*

v.

PETE WILSON, Governor of the State of California; and the State of California,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

DANIEL E. LUNGREN
Attorney General of the State of California
RODERICK E. WALSTON
Chief Assistant Attorney General

*MANUEL M. MEDEIROS
Supervising Deputy Attorney General
1300 I Street
Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

*Attorneys for Respondents Governor Pete Wilson and the State of California*

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

## QUESTION PRESENTED FOR REVIEW

Whether certain gaming activities proposed to be conducted by Petitioner Tribes on Indian lands in California are permitted in California, within the meaning of 25 U.S.C. § 2710(d)(1)(B), where the proposed gaming activities are categorically forbidden to all others under state law.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW ..... i

STATEMENT OF THE CASE ..... 1

ARGUMENT ..... 5

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED ..... 5

A. There Is No Disagreement Among The Circuits On The Question Whether 25 U.S.C. § 2710(d)(1)(B) Authorizes Tribes To Engage In Gaming Activities That Are Categorically Prohibited Under State Law ..... 5

B. The Judgment Of The Ninth Circuit Is Well-Reasoned And Faithful To The Congressional Intent As Expressed In IGRA Itself ..... 8

C. Petitioners Improperly Seek To Employ These Proceedings To Define The Parameters Of The Authority Of The Secretary Of The Interior. The Issue Is Plainly Premature .... 10

II. THE COURT SHOULD REJECT THE SUPPORTING RESPONDENT TRIBES' SUGGESTION TO DELAY DISPOSITION OF THE PETITION ..... 11

CONCLUSION ..... 14

# TABLE OF AUTHORITIES

Page

CASES

*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) ..... 3

*California v. Monteau*, E.D.Cal. No. CIV-S-96-797 LKK ..... 12

*Coeur D'Alene Tribe v. Idaho*, 51 F.3d 876 (9th Cir. 1995), *affirming*, 842 F.Supp. 1268 (N.D. Idaho 1994) ..... 6

*Lac du Flambeau Band of Mission Indians v. Wisconsin*, 743 F.Supp. 645 (W.D. Wisc. 1990) ..... 7

*Lac du Flambeau Band of Mission Indians v. Wisconsin*, 957 F.2d 515 (7th Cir. 1992) ..... 7

*Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2d Cir. 1990) ..... 6

*Oklahoma v. Ponca Tribe*, ___ U.S. ___, 116 S.Ct. 1410 (1996) ..... 7

*Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994) ..... 7, 8, 11

*Seminole Tribe of Florida v. State of Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996) ..... 7, 10, 11

*State of New Mexico ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995) ..... 6

*Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) ..... 13

*United States v. E.C. Investments*, 77 F.3d 327 (9th Cir. 1996) ..... 6

*United States v. Rincon Band of Mission Indians*, S.D.Cal. No. CV 95-557(H) ..... 13

TABLE OF AUTHORITIES – Continued

Page

*United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990) ..... 6

*Western Telcon, Inc. v. California State Lottery*, 13 Cal.4th 475 (1996) ..... 1, 4

*Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (1994) ..... 8

STATUTES

California Government Code

§ 8880.12 ..... 4

California Penal Code

§ 330 ..... 1, 2, 4, 9

§ 330a ..... 1, 2, 9

§ 330b ..... 1, 2, 4, 9

§ 330b(2) ..... 1

§ 330.1 ..... 1

18 United States Code

§ 1166(a) ..... 8, 9

§ 1166(b) ..... 9

§ 1166(d) ..... 14

25 United States Code

§ 2710(d)(1)(B) ..... *passim*

§ 2710(d)(1)(C) ..... 12, 13

§ 2710(d)(3) ..... 11

TABLE OF AUTHORITIES – Continued

Page

§ 2710(d)(3)(A) ..... 7

§ 2710(d)(6) ..... 9

§ 2710(d)(7)(B)(vii) ..... 10, 11

RULE

F.R.Evid. 201(b) ..... 12

OTHER AUTHORITIES

U.S. Attorney Alan Bersin, "Resolving the Indian Gaming Problem," *The San Diego Union-Tribune,* Opinion; Ed. B-7, pp. 7, 8 (June 26, 1996) ..... 13

## STATEMENT OF THE CASE

In general, the State Respondents[1] agree with the statement of facts set out in the Petition. However, the following clarifying remarks are offered.

The following facts cannot be disputed: California law expressly and absolutely forbids the conduct of banked or percentage games played by cards, dice, or device, Cal. Pen. Code § 330, and California law expressly forbids gambling by use of "slot machines," as defined by state statutes. Cal. Pen. Code §§ 330a, 330b, 330.1.[2] The

---

[1] The term "State Respondents" will be used to include both the State of California and Governor Pete Wilson.

[2] The District Court declined to reach the question whether the on-line computer terminals employed by the California State Lottery amount to "slot machines" as defined by section 330b(2) of the California Penal Code Pet. App. 49, n. 20. Contrary to Petitioners' assertion, Pet. 6, n. 4, the District Court did not "assume" that the terminals constitute slot machines. Rather, the court opined that, however the State's terminals might be characterized, the Tribes are entitled to employ similar equipment, Pet. App. 49, n. 20 – a proposition that the State Respondents had never denied. Before the Court of Appeals, the State Respondents objected to the District Court's statement that there are "substantial similarities" between the State's equipment and the devices proposed to be operated by the Tribes, on the ground that the statement was wholly unsupported by any record evidence. *See, id.* The Court of Appeals thus remanded the matter to the District Court "to consider the limited question of whether California permits the operation of slot machines in the form of the state lottery or otherwise." Pet. App. 23. The State Lottery contends that their terminals do not constitute "slot machines," but that, if they were slot machines, the state-law prohibitions against such devices would apply to that agency as to others. *See, Western Telcon, Inc. v. California State Lottery,* 13 Cal.4th 475, 483 (1996).

proceedings in the District Court were commenced in response to a disagreement between the Tribes and the State over the question whether certain class III gaming activities proposed to be conducted by the Tribe – *viz.*, electronic gambling devices and banked and percentage card games, Pet. App. 11[3] – are – "permitted" in California for purposes of 25 U.S.C. § 2710(d)(1)(B). Pet. App. 13. The Tribes did not dispute that the electronic gambling devices they proposed to offer amounted to "slot machines" prohibited by section 330b of the California Penal Code. Pet. App. 47 n. 18, nor was there any dispute that the Tribes also proposed to offer banked and percentage card games, Pet. App. 11, games that are expressly prohibited by state law. *See* Cal. Pen. Code § 330.

The State took the "straightforward" position, Pet. App. 14, that, because the Tribes' proposed gaming activities are unequivocally prohibited in California, *see* Cal. Pen. Code §§ 330, 330a, 330b,[4] they are not "permitted" in

---

If, however, Petitioners were to prevail on remand with respect to the state-law question, they would have satisfied the test under 25 U.S.C. § 2710(d)(1)(B). There is no dispute that the Petitioners may engage in any form of gambling that is, in fact, permitted elsewhere in the State.

[3] Reference is to page 11 of the Appendix to the Petition for Writ of Certiorari.

[4] Petitioners somewhat inaccurately assert that "the district court determined that some of the forms of Class III gaming requested by the Tribes (house-banked and percentage card games) were *not expressly authorized* by state law." Pet. App. 7 (italics added). In fact, the District Court noted that such gaming activities are *prohibited* by state law, and the court further noted that the Tribes do not dispute this point. Pet. App. 49; *see also*, Pet. App. 29 ("The State has consistently maintained

California within the meaning of IGRA, 25 U.S.C. § 2710(d)(1)(B). The Tribes contended, in contrast, that the express prohibitions of state law are not determinative of the question whether the proposed activities are permitted in California. Rather, the Tribes argued, all gambling activities – including those expressly prohibited by state law – are permitted in California for purposes of IGRA, because California has a general "regulatory" policy towards gambling. Pet. App. 14. As support for this Proposition, the Tribes rely on language found in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *Id.*

Throughout these proceedings, the Tribes have confused the federal-law dispute by simply *pronouncing* certain gaming activities to be "banked" or "percentage" gaming, *see, e.g.*, Pet. 6, n. 4, or by *pronouncing* that online computer terminals used by the state-operated lottery to be "slot machines." In this way, the Tribes seek to suggest that they propose only to offer gaming activities that *are* engaged in by others in the State.[5]

The State has never denied that Petitioners may engage in any gaming activities that are conducted by any other person or entity in California. The instant action was initiated by Petitioners because the Tribes seek

---

a strong public policy prohibiting casino gambling, including banking card games and percentage card games. Accordingly, such games are prohibited in California, are against the State's public policy, and may not be operated by Tribes.")

[5] The action below was commenced as an action for declaratory relief, brought by stipulation of the parties to resolve a question of law. Petitioners never alleged that the State has refused to negotiate about gaming activities conducted by others in California.

to engage in gaming activities that *are not*, in fact, conducted by others in California.[6] The issue, therefore, is not whether *others* in California are engaged in banked or percentage gaming; that question is an ordinary factual dispute involving construction of state law.[7] The issue

---

[6] Petitioners' device of *characterizing* off-reservation gaming activities to be lawfully conducted banked and percentage games or slot machines is, thus, a disingenuous means of distracting the courts from the real, and only, federal issue in this case: Is a gaming activity "permitted" in California within the meaning of 25 U.S.C. § 2710(d)(1)(B), when the gaming activity is absolutely forbidden to all persons elsewhere in the state under state law?

[7] It is the question presented, for example, in *Western Telcon, Inc.*, 13 Cal.4th 475. That action was commenced by California horsemen and cardroom investors to enjoin the conduct of Keno by the California State Lottery. Plaintiffs in that action alleged that Keno is a banked game played by device, prohibited by section 330 of the California Penal Code, and that, offered as an on-line game, Keno amounts to a slot machine prohibited by section 330b of the Penal Code. The California-Nevada Indian Gaming Association (CNIGA), of which Petitioners are members, intervened in that action for the purpose of arguing that, even if Keno were a banked game or amounted to a slot machine, the game would nevertheless be permissible because, the Tribes argued, the State Lottery is *exempt* from the statutory prohibitions against banked games played by device. *Western Telcon, Inc.*, 13 Cal.4th at 495 ("CNIGA contends [that] the Lottery Act grants CSL a complete exemption from the antigaming provisions of chapter 10.") In this way, the Tribes hoped to support their contention in federal court that banked and percentage games are permitted in California. The California Supreme Court, however, rejected the Tribes' contention and struck down the Keno game as unlawful. The state court ruled that the California State Lottery has authority only to offer lottery games within the meaning of the State Lottery Act. *See* Cal. Gov. Code 8880.12.

presented to the federal courts for adjudication by the parties was whether, under the Indian Gaming Regulatory Act (IGRA), Petitioners are entitled to engage in gaming activities that are *indisputably prohibited* to all others by state law.[8]

## ARGUMENT

### I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

#### A. There Is No Disagreement Among The Circuits On The Question Whether 25 U.S.C. § 2710(d)(1)(B) Authorizes Tribes To Engage In Gaming Activities That Are Categorically Prohibited Under State Law

As noted above, the federal issue presented by the parties to the litigation concerns the Tribes' claim of

---

[8] By their self-serving pronouncements that games being played by some in California are "banked games" or "percentage games" within the meaning of California law, Petitioners also seek to create an *illusion* that California permits some forms of banked or percentage gaming while prohibiting others, thereby attempting to lend credence to their contention that California's policy towards banked and percentage games is "regulatory." But, again, Petitioners' claim is only illusory. If, in fact, banked and percentage games are lawfully being played by others in California by virtue of some exemption from the general statutory prohibition, there is no need to reach the question whether California's policy is "regulatory," for the State has never disputed that those gaming activities would also be available to Petitioners pursuant to 25 U.S.C. § 2710(d)(1)(B). There simply is no controversy between the parties over the question whether the Tribes may engage in gaming activities that are, in fact, conducted off-reservation in California.

entitlement to engage in gaming that is forbidden to others under state law. California has never disputed that Petitioners may engage in gaming activities that are conducted by others in the State; whether some in the State are, in fact, permitted to engage in the form of gaming proposed by the Tribes is a simple question of fact not presented by the parties to the federal courts for disposition.

Petitioners misrepresent the state of consensus among the circuits concerning the only federal-law issue presented by these proceedings. No court of appeals other than Ninth Circuit has addressed the question whether 25 U.S.C. § 2710(d)(1)(B) entitles Tribes to engage in activity that is *categorically* prohibited in the State. Other panels of the Ninth Circuit have followed the decision of the Court of Appeals in this case, *see Coeur D'Alene Tribe v. Idaho*, 51 F.3d 876 (9th Cir. 1995), *affirming*, 842 F.Supp. 1268 (N.D. Idaho 1994); *United States v. E.C. Investments*, 77 F.3d 327 (9th Cir. 1996), and the decision has been relied upon by at least one state court for the purpose of ascertaining the parameters of a state governor's powers, under state law, to enter into tribal-state compacts. *State of New Mexico ex rel. Clark v. Johnson*, 904 P.2d 11, 19 (NM 1995).

No other decisions are in conflict with the decision below. *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2d Cir. 1990) involved a tribe's request to conduct casino gaming activities that are *permitted* to others in the state, albeit only for charitable purposes. 913 F.2d at 1026, 1029. It is not at all clear that the Second Circuit would have come to the same conclusion had the Tribes proposed to conduct gaming activities that are prohibited to all within the state, *i.e.*, the premise of the instant litigation. The same is true of *United States v.*

*Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990), which involved the question of the extent to which state laws regulating blackjack apply on the reservation; the game in question was *permitted* to others in the state, and the issue was genuinely one of *regulation* of that activity.

*Lac du Flambeau Band of Mission Indians v. Wisconsin*, 743 F.Supp. 645 (W.D. Wisc. 1990), also relied on by Petitioners, is not, of course, the decision of a circuit court, but rather the decision of a single district court judge. The appeal to the circuit court was dismissed by that court as untimely. *Lac du Flambeau Band of Mission Indians v. Wisconsin*, 957 F.2d 515 (7th Cir. 1992). The district court judge's analysis included reasoning that the Wisconsin voters' amendment of the state constitution to permit lotteries had the necessary effect of permitting *all* forms of gambling. *Lac du Flambeau Band*, 743 F.Supp. at 651.

Petitioners' quotation from *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994) is misleading. As a threshold matter, the decision was *vacated* by this Court and remanded for reconsideration in light of *Seminole Tribe. Oklahoma v. Ponca Tribe*, ___ U.S. ___, 116 S.Ct. 1410 (1996). The appellate court's consideration of the extent to which IGRA imposes obligations to negotiate on states is, therefore, of dubious precedential value. Furthermore, the language quoted by Petitioners concerns, not the meaning of section 2710(d)(1)(B), but rather the impact of *section 2710(d)(3)(A)* for purposes of Tenth Amendment analysis. 37 F.3d at 1434. To the extent that the Tenth Circuit's reasoning could be said to bear on the question presented in the instant case, that analysis is entirely *consistent* with the decision of the Ninth Circuit.

*Ponca Tribe* recognized that if a state has a policy against gambling that is less restrictive than a wholesale ban on the activity, "nothing in IGRA requires the *state* to surrender or compromise these policies or preferences in attempting to negotiate a compact with the Indian tribe." 37 F.3d at 1434 (italics in original).

Petitioners also make a rather oblique argument that the decision of the Ninth Circuit herein is at odds with the analysis of the Fifth Circuit in *Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (1994). But the Fifth Circuit's disquisition on IGRA in that case was manifestly gratuitous dicta. The court held that the action was governed, not by IGRA at all, but rather by the Texas Restoration Act, and, indeed, the court further ruled that the district court lacked jurisdiction under the Eleventh Amendment to entertain the Tribes' claim in the first instance. 36 F.3d at 1335-1336.

In reality, then, the Ninth Circuit's decision in this case stands *uncontroverted* with respect to disposition of a Tribe's claim of entitlement to engage in a form of gambling that is *forbidden to all other persons in the State.*

### B. The Judgment Of The Ninth Circuit Is Well-Reasoned And Faithful To The Congressional Intent As Expressed In IGRA Itself

Section 23(a) of IGRA, 18 U.S.C. § 1166(a), assimilates onto Petitioners' Indian lands all state gambling laws, whether "civil" or "criminal." For purposes of federal law on Indian lands, then, Congress has eliminated any need to determine whether a gambling law is "civil-regulatory" or "criminal-prohibitory." As a matter of federal

law, then, sections 330, 330a, and 330b of the California Penal Code apply to Petitioner's activities on Indian lands by virtue of 18 U.S.C. § 1166(a), (b), without regard to the question whether California's policy toward gambling in general should be characterized as "regulatory."

The decision below thus *harmonizes* 25 U.S.C. § 2710(d)(1)(B) and 18 U.S.C. § 1166(a). Application of the plain language of section 2710(d)(1)(B) results in the "level playing field" intended by Congress, *i.e.*, whatever games are played elsewhere in a State may be played on Indian lands in that State, and only those games that are played elsewhere in the State are authorized by Congress for play on Indian lands.

In contrast, Petitioners' construction of 25 U.S.C § 2710(d)(1)(B) would render the statutory scheme virtually unintelligible. Under Petitioners' analysis, slot machines are "permitted" in California for purposes of 25 U.S.C. § 2710(d)(1)(B) – because California's policy toward gambling in general is assertedly "regulatory" – although slot machines are clearly forbidden on Indian lands by the very same state laws, Cal. Pen. Code §§ 330a, 330, as assimilated by Congress onto Indian lands. 18 U.S.C. § 1166(a); *see also* 25 U.S.C. § 2710(d)(6). Petitioners thus contend for, not a "level playing field," but for a *privileged status;* they seek the *unique* capability of being able to engage in a form of gambling that is categorically forbidden to everyone else in the State under every circumstance. Petitioners would thus impress the State into the task of relieving the Tribes from the effects of *Congress'* choice in 18 U.S.C. § 1166(a) to import onto Indian lands the whole of the State's gambling laws.

The Ninth Circuit's decision reflects a logical approach to the question of the scope of gaming permissible on Indian lands in California. It is an approach that is not only straightforward, but harmonizes all provisions of IGRA and faithfully effectuates Congress' purpose to create a level playing field for Tribes desiring to compete with other gaming interests in the State. As the only circuit court opinion to address the application of 25 U.S.C. § 2710(d)(1)(B) in the context of an unqualified statutory prohibition against a gaming activity, the decision below should be left undisturbed.

### C. Petitioners Improperly Seek To Employ These Proceedings To Define The Parameters Of The Authority Of The Secretary Of The Interior. The Issue Is Plainly Premature

Petitioners argue that the Court should grant the petition in order to resolve anticipated questions, assertedly left open by the *Seminole Tribe* decision,[9] involving the scope of the Secretary of the Interior's powers under 25 U.S.C. § 2710(d)(7)(B)(vii). But this case clearly does not involve construction of any provision of section *2710(d)(7)(B)(vii);* the meaning of that statute was never briefed below, nor did the Court of Appeals purport to construe that statute. The sole question presented in this case is the meaning of the section *2710(d)(1)(B).* Moreover, the context of these proceedings is not state resistance to adjudication, but rather a good faith effort by the

---

[9] *Seminole Tribe of Florida v. State of Florida,* ___ U.S. ___, 116 S.Ct. 1114 (1996).

Tribes and the State to resolve their differences concerning the State's obligation to negotiate about the disputed gaming activities.

This Court's decision in *Seminole Tribe* is, thus, utterly irrelevant to these proceedings, for the rather obvious reason that California *consented* to this action. *See* Pet. App. 26. The possible consequences flowing from a State's *refusal* to consent to suit are, therefore, not in issue. The same is true for Petitioners' suggestion that the Secretary of the Interior might have power *under section 2710(d)(7)(B)(vii)* to permit Tribes to engage in gaming activities over which a State had no obligation *under section 2710(d)(3)* to negotiate in the first instance. When, and if, the Secretary should act in furtherance of such assumed powers, *i.e.*, when the issue is ripe for consideration, the matter will doubtless be litigated and more properly brought before this Court for consideration. *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d at 1434 n. 17.

## II. THE COURT SHOULD REJECT THE SUPPORTING RESPONDENT TRIBES' SUGGESTION TO DELAY DISPOSITION OF THE PETITION

The action below was initiated pursuant to a stipulation between the State of California and some 16 Indian Tribes for the purpose of resolving a dispute of law concerning the scope of permissible class III gaming on Indian lands in California. The action was initiated nearly five years ago, in 1992, in the hopes of resolving an impasse in tribal-state compact negotiations. Now that the litigation promises to conclude *adversely to the Tribes*,

nine of the plaintiff Tribes seek further delay in bringing an end to this litigation.

None of the "Nine Respondent Indian Tribes" is presently negotiating with the State of California. Eight of these nine are plaintiffs in this action who elected to open class III casinos prior to resolution of the dispute presented in this litigation; they are presently unlawfully engaged in large-scale casino gambling in California without a tribal-state compact, in violation of the Indian Governing Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(1)(C).[10] The ninth Tribe has initiated litigation against California, in *state court*, to compel negotiations about class III gaming activities at issue in the instant litigation.

The only Tribe presently involved in compact negotiations with the Governor of California, the Pala Band of Mission Indians, is not among those seeking a delay in the disposition of the petition for writ of certiorari.[11] Clearly, the State of California, the other party to the

---

[10] The Court is respectfully requested to take judicial notice of this well-known fact in California. F.R.Evid. 201(b). Indeed, in 1996, the State of California initiated litigation against the National Indian Gaming Commission in the United States District Court for the purpose of bringing about enforcement of IGRA's express prohibition against the widespread conduct of un-compacted class III gaming. *California v. Monteau*, E.D.Cal. No. CIV-S-96-797 LKK.

[11] The Pala Band was not a plaintiff in the proceedings below. The nine Tribes appear to be using their status as respondents to make representations on behalf of the non-party Pala Band.

compact negotiations, is not requesting a delay in disposition of the petition.

The State Respondents vigorously disagree with these Tribes' self-serving suggestion that delay in disposition of the petition for writ of certiorari would assist the negotiations between the Pala Band and the State. The State's position is precisely the same now as it was in 1992, when this litigation was initiated: The State will negotiate about any gaming activity that is permitted to anyone else in California; the State will not negotiate about any activity that is forbidden to everyone else in California. The State's position has now been vindicated; uncertainty about the permissible scope of class III gaming on Indian lands in California may finally be laid to rest; and the dispute over scope of permissible gaming need no longer pose an impediment to conclusion of compact with the Pala Band. Denial of the petition for writ of certiorari would, therefore, *further* the cause of concluding a compact with the Pala Band, by eliminating any disagreement over the permissible scope of gaming.

Furthermore, United States Attorneys in California are relying on conclusion of this litigation to resolve uncertainty concerning the permissible scope of gaming on Indian lands in California. *See, e.g., United States v. Rincon Band of Mission Indians*, S.D.Cal. No. CV 95-557(H); U.S. Attorney Alan Bersin, "Resolving the Indian Gaming Problem," *The San Diego Union-Tribune*, Opinion; Ed. B-7, pp. 7, 8 (June 26, 1996). California must rely on the United States Attorneys to enforce Congress' unequivocal intent to preclude commencement of casino gambling without a compact. 25 U.S.C. § 2710(d)(1)(C); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994). It

is not surprising, then, that the Tribes presently seek to avoid finality of the Ninth Circuit's decision, as they may now have to face the prospect of curtailing their unlawful activities. But, if California is to be denied the ability to enforce its own gambling laws for the protection of its citizens, see 18 U.S.C. § 1166(d), then it is of the utmost importance to the State that there be no unnecessary delay in resolution of this important issue for the guidance of the United States Attorneys.

## CONCLUSION

For the reasons stated, the Court is requested to deny the petition for writ of certiorari.

DANIEL E. LUNGREN
Attorney General of the
State of California
RODERICK E. WALSTON
Chief Assistant Attorney General

*MANUEL M. MEDEIROS
Supervising Deputy Attorney
General

*Attorneys for Respondents*
*Governor Pete Wilson and*
*the State of California*

**Counsel of Record*

Supreme Court, U.S.
FILED
MAR 6 1997
CLERK

(H)

No. 96-1059

In The

# Supreme Court of the United States

October Term, 1996

SYCUAN BAND OF MISSION INDIANS; MORONGO BAND OF MISSION INDIANS; SANTA ROSA BAND OF TACHI INDIANS; CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY; SOBOBA BAND OF MISSION INDIANS; ROBINSON BAND OF POMO INDIANS,

*Petitioners,*

v.

PETE WILSON, Governor of the State of California; and the State of California,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION

GEORGE FORMAN*
PATRICIA A. PROCHASKA
*Counsel of Record
FORMAN & PROCHASKA
Attorneys at Law
4340 Redwood Highway, Suite F228
San Rafael, CA 94903
(415) 491-2310

*Attorneys for Petitioners*

March 6, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13pp

TABLE OF CONTENTS

Page

REPLY TO STATE RESPONDENTS' STATEMENT OF THE CASE ..... 1

ARGUMENT ..... 3

I. The Circuits Clearly Disagree On The Question Whether The Permissible Scope Of Class III Gaming Under IGRA Is To Be Determined By *California v. Cabazon*'s Public Policy Test, Or By What State Law Expressly Authorizes ..... 3

II. The Judgment Of The Ninth Circuit Is Poorly Reasoned And Betrays Both Congressional Intent And The Plain Language Of IGRA ..... 7

III. Petitioners Do Not Seek To Define The Parameters Of The Secretary Of The Interior's Authority, But Only The Scope Of Class III Gaming For Which The Secretary May Prescribe Procedures ..... 8

IV. Petitioners Do Not Object To Deferral Of The Disposition Of The Petition ..... 9

CONCLUSION ..... 10

# TABLE OF AUTHORITIES

Page

## CASES

*Cabazon Band, et al., v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994), *cert. den.*, 114 S.Ct. 2709 (1994) ..... 9

*California v. Cabazon*, 480 U.S. 202 (1987) ..... 4, 6

*Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993) ..... 5

*Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2d Cir. 1990) ..... 4, 6

*Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994) ..... 4, 5

*Rumsey v. Wilson*, 64 F.3d 1250 (1995) ..... 4

*Seminole Tribe of Florida v. State of Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996) ..... 5

*Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), *cert. den.*, 116 S.Ct. 297 (1995) ..... 9

*Western Telcon, Inc. v. California State Lottery*, 13 Cal.4th 475 (1996) ..... 1, 2

## STATUTES

18 U.S.C. § 1166(a) and (b) ..... 7, 8

18 U.S.C. § 1166(c) ..... 7, 8

25 U.S.C. § 2710(b)(1)(A) ..... 3

25 U.S.C. § 2710(d)(1)(B) ..... 3, 5

25 U.S.C. § 2710(d)(3)(A) ..... 9

25 U.S.C. § 2710(d)(7)(B)(vii) ..... 8

California Penal Code § 330b ..... 1

California Penal Code § 330c ..... 6

## REPLY TO STATE RESPONDENTS' STATEMENT OF THE CASE

In their Statement of the Case, State Respondents make some "clarifying remarks" which, unfortunately, tend more to obfuscate than to clarify. Petitioners will briefly respond only to those obfuscatory comments that might be relevant to the Court's determination whether to grant this Petition.

First, State Respondents would have this Court believe that in *Western Telcon, Inc. v. California State Lottery*, 13 Cal.4th 475, at 483 (1996), the California Supreme Court held that the California State Lottery ("CSL") cannot use what California Penal Code § 330b defines as "slot machines" to operate otherwise lawful lottery games. Brief in Opposition, p. 1, at fn.1. In fact, the California Supreme Court acknowledged that the CSL could use random number generators, on-line computers and video terminals to operate matching numbers and instant games, but expressly declined to reach or decide whether such electronic devices were "slot machines" within the meaning of Pen. Code § 330b:

> Because CSL may conduct only lotteries, and because CSL Keno, as described in the regulations, is not a lottery, CSL is not authorized to conduct its Keno game. We therefore need not decide whether CSL Keno also involves the use of slot machines, as plaintiffs further contend. Nor need we decide whether, as CNIGA contends, the Lottery Act grants CSL a complete exemption from the antigaming provisions of

> chapter 10, so that it may conduct any authorized game whether or not the game is prohibited by Penal Code § 330, uses slot machines, or violates other statutes in chapter 10.

13 Cal.4th 475, at 496.

Second, State Respondents have grossly mischaracterized Petitioners' position regarding the scope of gaming "permitted" in a State for the purposes of IGRA. Petitioners do not contend that, " . . . all gambling activities – including those expressly prohibited by state law – are permitted in California for purposes of IGRA, because California has a general 'regulatory' policy towards gambling." Brief in Opposition, p. 3. Rather, Petitioners actually contend only that,

> . . . a state "permits" a specific gaming activity if it "regulates" the activity in general rather than prohibiting it entirely as a matter of public policy. Under this approach, a specific illegal gaming activity is "regulated," rather than "prohibited," if the state allows the operation of similar gaming activities.

Pet. App. 14.

Finally, State Respondents either have missed or mischaracterized the point of Petitioners' illustration of the ways in which California permits some forms of banked or percentage gaming while prohibiting others. Brief in Opposition, p. 5. The point of that illustration was to demonstrate that the Court of Appeals' inconsistent construction of IGRA would allow the State arbitrarily to constrict Tribes to negotiating about specific subcategories of Class III gaming even as the State's public policy

does not criminally prohibit the broader categories of Class III gaming within which the subcategories fall.

## ARGUMENT

### I. The Circuits Clearly Disagree On The Question Whether The Permissible Scope Of Class III Gaming Under IGRA Is To Be Determined By *California v. Cabazon*'s Public Policy Test, Or By What State Law Expressly Authorizes.

State Respondents first assert that, " . . . whether some in the State are, in fact, permitted to engage in the form of gaming proposed by the Tribes is a simple question of fact not presented by the parties to the federal courts for disposition." Brief in Opposition, p. 6. This assertion begs the question that this case has presented since its inception; *i.e.*, the intent of Congress when it provided in 25 U.S.C. § 2710(d)(1)(B) that Class III gaming activities shall be lawful on Indian lands only if such activities are, *inter alia*, " . . . located in a State that permits such gaming for any purpose by any person, organization or entity."

The Court of Appeals in this case clearly held that the word "permits," when used in 25 U.S.C. § 2710(b)(1)(A) to determine whether a Tribe may engage in Class *II* gaming, has a completely different meaning than when used in 25 U.S.C. § 2710(d)(1)(B) to determine whether and to what extent a Tribe may engage in Class

III gaming on its Indian lands. According to the Court of Appeals, whether a State "permits" Class II gaming is to be determined according to the public policy test of *California v. Cabazon*, 480 U.S. 202 (1987),[1] while the scope of Class III gaming that a State "permits" is to be determined solely by what State law affirmatively authorizes other persons or entities to conduct. *Rumsey v. Wilson*, 64 F.3d 1250, 1258 (1995).

The six Circuit Judges who would have granted the Tribes' petition for rehearing *en banc*, *Rumsey v. Wilson*, *id.*, 64 F.3d at 1253, n. 1, pointed out that the panel should have focused on the entire phrase "permits such gaming," rather than isolating only on the word "permits," and noted that the Second Circuit, in *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2d Cir. 1990), just as clearly held that the phrase "permits such gaming" is to be given exactly the same meaning when applied to either Class II or Class III gaming.

State Respondents attempt to blur this clear conflict between the two Circuits by contending that the Ninth Circuit's decision in this case dealt with gaming that is "categorically" prohibited in the State, while the Second Circuit's decision in *Mashantucket Pequot Tribe v. State of Connecticut* dealt with gaming that, at least to some degree, was allowed by State law. As demonstrated by the language of not only the Second Circuit in *Mashantucket Pequot*, but also the Tenth Circuit in *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), vacated and remanded for reconsideration in light

---

[1] *I.e.*, whether the State criminally prohibits all Class II gaming activity as a matter of public policy.

of *Seminole Tribe of Florida v. State of Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996),[2] this is a distinction without a difference, and simply begs the question presented by this Petition; *i.e.*, whether the scope of Class III gaming that a State "permits" within the meaning of 25 U.S.C. § 2710(d)(1)(B) is to be determined by examining the State's public policy toward broad categories of Class III gaming (such as wagering on the outcome of horse races, card games and lotteries), or by a detailed search for express statutory authorization not only for each broad category of Class III gaming, but also for each specific Class III game and variation thereof within each broad category, and even such details as proposed prize levels,[3] game themes, days and hours of operation, *etc.*

There simply is no way to reconcile the decision of the Ninth Circuit in this case with the Second and Tenth

---

[2] "If a state has a policy prohibiting all Class III gaming, then Indian Class III gaming is also automatically prohibited. 25 U.S.C. § 2710(d)(1)(B). If it has any other less restrictive policy or preference regarding Class III gaming in particular, or Class III gaming on Indian lands specifically, nothing in IGRA requires the state to surrender or compromise those policies or preferences in attempting to negotiate a compact with the Indian tribe. Of course, the federal government may ultimately override state policy by regulation [fn. om.] imposed by the Secretary of the Interior, . . . " *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d, *supra*, at 1434.

[3] In *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993), the Eighth Circuit held not only that the State need not negotiate about traditional keno when State law authorized video keno, but also that the State need not negotiate about converting a concededly lawful Class II card game into Class III activity by offering higher wager limits than allowed under State law.

Circuits' conclusion that unless *California v. Cabazon*'s public policy test is used to ascertain the scope of Class III gaming that a State "permits" within the meaning of IGRA,

> The compact process that Congress established as the centerpiece of the IGRA's regulation of Class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.

*Mashantucket Pequot Tribe v. State of Connecticut, supra,* at 1030-1031.

According to State Respondents [Brief in Opposition, p. 6], the premise of this case is that the Tribes may "conduct gaming activities that are prohibited to all within the state[.]" This is a gross mischaracterization of the Tribes' position.

The actual premise of Petitioners' case is that because California's public policy is to allow 1) a broad spectrum of gaming activities, including widespread Class II activity (bingo, pulltabs – which Pen. Code § 330c includes within the definition of "slot machine" – and numerous card games without any limits on wagers, pot sizes or operating hours) and 2) broad categories of Class III activity,[4] and because State law authorizes the CSL to use random number generators, on-line computers, player-actuated video terminals and even playing cards to conduct on-line numbers games and instant games, California Tribes are entitled to negotiate for compacts that authorize the Tribes to use random number generators,

---

[4] *California v. Cabazon, supra.*

on-line computers, player-actuated video terminals and playing cards to operate lotteries and any other form of Class III gaming that the State's public policy does not criminally prohibit, even if a specific form of gaming is not expressly authorized by State law, and even if some of the equipment used to conduct such gaming would come within the State's definition of a "slot machine."

## II. The Judgment Of The Ninth Circuit Is Poorly Reasoned And Betrays Both Congressional Intent And The Plain Language Of IGRA.

State Respondents contend that under 18 U.S.C. § 1166(a) and (b), California's gambling laws apply to Petitioners' activities on Indian lands without regard to whether California's public policy toward gambling in general is "regulatory" or "prohibitory," and thus that application of *California v. Cabazon*'s public policy test to determine the scope of Class III gaming allowable under a compact "would render the statutory scheme virtually unintelligible." Opposition Brief, at p. 9. This contention both ignores 18 U.S.C. § 1166(c),[5] and completely misconceives the nature and purpose of the compacting process. To the extent that the Ninth Circuit's decision may be

---

[5] "(c) For the purpose of this section, the term "gambling" does not include –

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect."

read to accept such an analysis, the need for this Court's review is that much more compelling.

18 U.S.C. § 1166(a) clearly assimilates State gambling laws, regulatory and prohibitory, into federal law, and makes those laws applicable to Indian country. However, jurisdiction to enforce those laws is vested exclusively in the United States. Just as clearly, however, 18 U.S.C. § 1166(c) *excludes* from the definition of "gambling" all Class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of IGRA and that is in effect. Thus, IGRA expressly contemplates that Tribal-State Class III gaming compacts will authorize Tribes to conduct gaming activity that otherwise would violate State gambling laws, a result that would be impossible under the decision of the Court of Appeals in this case.

## III. Petitioners Do Not Seek To Define The Parameters Of The Secretary Of The Interior's Authority, But Only The Scope Of Class III Gaming For Which The Secretary May Prescribe Procedures.

State Respondents argue that Petitioners improperly are seeking to use this action to define the parameters of the Secretary of the Interior's authority to prescribe procedures under which a Tribe may conduct Class III gaming pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii). Brief in Opposition, p. 10. This completely mischaracterizes Petitioners' objective.

Rather, Petitioners seek only to establish the criteria by which to determine the scope of Class III gaming that a State permits, whether for the purposes of compact

negotiations or Secretarial prescription of Class III procedures, if and when the Secretary invokes his/her authority to prescribe such procedures under IGRA. Thus, this crucial issue is ripe for decision now, and should be decided in this case. To do otherwise would indefinitely postpone a decision vital to the economic lifeblood of many Tribes throughout the country, and especially to Tribes within the Ninth Circuit.[6]

## IV. Petitioners Do Not Object To Deferral Of The Disposition Of The Petition.

Nine of the other Tribes involved in this case in the court below have suggested that disposition of the Petition be deferred pending the outcome of compact negotiations currently in progress between the State of California and the Pala Band of Mission Indians.[7] Petitioners do not oppose that suggestion.

---

[6] Petitioners and most of the other Tribes involved in this case have been trying since 1991 to obtain Class III compacts with the State of California; this case has been pending since 1992.

[7] Although 25 U.S.C. § 2710(d)(3)(A) expressly authorizes Tribes already conducting Class III gaming activity on Indian lands to request negotiation of compacts, the State of California refuses to negotiate with any Tribe that the State contends is engaged in uncompacted Class III gaming activity, even though the Tribes commenced that activity in the good faith belief that it constituted Class II gaming. *See, e.g., Cabazon Band, et al., v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994), *cert. den.*, 114 S.Ct. 2709 (1994); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), *cert. den.*, 116 S.Ct. 297 (1995).

## CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the Petition, if and when the Court acts on the Petition for writ of certiorari, the Petition should be granted.

DATED this 6 day of March, 1997.

Respectfully submitted,

GEORGE FORMAN
*Counsel of Record*
PATRICIA A. PROCHASKA
FORMAN & PROCHASKA
*Attorneys for Petitioners*

Supreme Court, U.S.
FILED
JUN 9 1997
OFFICE OF THE CLERK

(5)

No. 96-1059

# In the Supreme Court of the United States

OCTOBER TERM, 1996

SYCUAN BAND OF MISSION INDIANS, ET AL.,
PETITIONERS

*v.*

PETE WILSON, GOVERNOR OF CALIFORNIA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WALTER DELLINGER
*Acting Solicitor General*
LOIS J. SCHIFFER
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
IRVING L. GORNSTEIN
*Assistant to the Solicitor General*
EDWARD J. SHAWAKER
M. ALICE THURSTON
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

25 pp

## QUESTION PRESENTED

Whether the Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2710(d)(1)(B), makes it unlawful for Indian Tribes to operate forms of Class III gaming that state law completely prohibits.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Statement | 1 |
| Discussion | 8 |
| Conclusion | 21 |


## TABLE OF AUTHORITIES

Cases:


*California* v. *Cabazon Bank of Mission Indians*, 480 U.S. 202 (1987) ..... 4, 5, 7, 12, 13, 14, 17

*Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273 (8th Cir. 1993) ..... 6, 19

*Citizen Band Potawatomi Indian Tribe* v. *Green*, 995 F.2d 179 (10th Cir. 1993) ..... 19

*Mashantucket Pequot Tribe* v. *Connecticut*, 913 F.2d 1024 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991) ..... 7, 9, 16, 17

*Ponca Tribe of Oklahoma* v. *Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), cert. dismissed, 116 S. Ct. 435 (1995), cert. granted, 116 S. Ct. 1410 (1996) ..... 18

*Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir. 1996), petition for cert. pending, No. 96-1617 ... 9

*Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114 (1996) ..... 3, 18

*United States* v. *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990) ..... 19

*Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) ..... 20

*Western Telcon* v. *California State Lottery*, 13 Cal. 4th 475, 917 P.2d 651, 53 Cal. Rptr. 2d 812 (1996) .... 7


Constitution, statutes and regulation:


U.S. Const.
Amend. X ..... 18
Amend. XI ..... 3

Act of Aug. 15, 1953, ch. 505, 57 Stat. 588 (Pub. L. No. 280) ..... 4, 13, 14

Statutes and regulation—Continued: Page

Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.* .... 1
25 U.S.C. 2703(6) .... 1
25 U.S.C. 2703(7)(A) .... 2
25 U.S.C. 2703(7)(B) .... 2, 16
25 U.S.C. 2703(8) .... 2
25 U.S.C. 2710(d)(1) .... 2, 10
25 U.S.C. 2710(d)(1)(B) .... 3, 6, 8, 9, 11, 12, 14, 16, 17, 19
25 U.S.C. 2710(d)(3)(A) .... 2
25 U.S.C. 2710(d)(3)(C) .... 14
25 U.S.C. 2710(d)(7)(A)(i) .... 3
25 U.S.C. 2710(d)(7)(B)(iii) .... 3
25 U.S.C. 2710(d)((7)(B)(iv) .... 3
25 U.S.C. 2710(d)(7)(B)(vi) .... 3
25 U.S.C. 2710(d)(7)(b)(vii) .... .... 3, 9
15 U.S.C. 1171(a)(1) .... 16
18 U.S.C. 1162 .... 4
28 U.S.C. 1360 .... 4
Cal. Penal Code (West 1988):
§ 326.5 .... 14
§ 330 .... 3
§ 330(a) .... 3
25 C.F.R. 502.4 .... 2, 16

Miscellaneous:

*Black's Law Dictionary* (6th ed. 1990) .... 6, 9
56 Fed. Reg. 15,746 (1991) .... 9
Letter from Thomas L. Sansoretti, Solicitor of United States Dep't of Interior, to Ass't Secretary for Indian Affairs (Apr. 9, 1991) .... 9
S. Rep. No. 446, 100th Cong., 2d Sess. (1988) .... 11, 14

# In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1059

SYCUAN BAND OF MISSION INDIANS, ET AL.,
PETITIONERS

*v.*

PETE WILSON, GOVERNOR OF CALIFORNIA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Acting Solicitor General to express the views of the United States.

### STATEMENT

1. a. Congress enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.*, in order to establish a system for regulating gaming activities on Indian lands. IGRA divides Indian gaming into three categories. Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. 2703(6). Class II gaming consists of bingo (including, if played at the same location, pull tabs, lotto, punch boards, tip jars, and other games similar to

bingo); non-banked card games[1] not illegal under the laws of the State; and card games actually operated in particular States prior to the passage of the Act. 25 U.S.C. 2703(7)(A). The Act expressly excludes from Class II gaming "any banking card games, including baccarat, chemin de fer, or blackjack (21)"; "electronic or electromechanical facsimiles of any game of chance"; and "slot machines of any kind." 25 U.S.C. 2703(7)(B). Class III gaming—at issue here—is defined as "all forms of gaming that are not class I gaming or class II gaming," including banked card games such as baccarat, chemin de fer, and blackjack (21); casino games such as roulette, craps, and keno; slot machines; sports wagering and parimutuel wagering on horse racing, dog racing, or jai alai; and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4.

Under IGRA, "Class III gaming activities" are lawful on Indian lands only if (1) authorized by an ordinance adopted by the governing body of the Tribe and approved by the Chairman of the National Indian Gaming Commission; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and (3) "conducted in conformance with a Tribal-State compact." 25 U.S.C. 2710(d)(1). This case concerns the proper interpretation of the second of those requirements.

b. A Tribe that would like to operate a Class III gaming activity initiates the compacting process by requesting the State to enter into negotiations. 25 U.S.C. 2710(d)(3)(A). Upon receiving such a request, the State is obliged to "negotiate with the Indian tribe in good faith to enter into such a compact." *Ibid.* If the State fails to

---

[1] A card game is "banked" if a gaming operator participates in the game with the players and acts as a house bank, paying all winners and retaining all other players' losses. A card game is a "percentage" game if the operator has no interest in the outcome of the game but takes a percentage of all amounts wagered or won. Pet. App. 11 n.10.

negotiate in good faith, the Tribe may initiate an action against the State in federal district court. 25 U.S.C. 2710 (d)(7)(A)(i). If the court finds that the State has failed to negotiate in good faith, it must order the State and the Tribe to conclude a compact within 60 days. 25 U.S.C. 2710 (d)(7)(B)(iii). If the State and Tribe fail to conclude a compact within that period, each party must submit its last best offer to a court-appointed mediator, who is to select one of those two proposals. 25 U.S.C. 2710(d)(7)(B) (iv). If the State consents to the mediator-selected proposal, it is treated as a Tribal-State compact. 25 U.S.C. 2710(d)(7)(B)(vi). If the State does not consent, the Secretary of the Interior may prescribe procedures for Class III gaming. 25 U.S.C. 2710(d)(7)(B)(vii). Under this Court's decision in *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114 (1996), a State has a right to avoid a Tribe's suit in federal court by asserting its Eleventh Amendment immunity.

2. Seven Indian Tribes requested the State of California to negotiate a compact permitting the operation of (1) stand-alone electronic games, such as electronic pull tabs, video poker, video bingo, video lotto and video keno; and (2) banked and percentage card games. Pet. App. 10-11 & n.9. California criminal law prohibits the operation of slot machines, Cal. Penal Code § 330a (West 1988), as well as banked and percentage card games, *id.* § 330. The State refused to enter into negotiations on the ground that the Tribes' proposed games fall within those state statutory prohibitions. Pet. App. 11.

The seven Tribes and the State agreed to seek a judicial determination of whether California "permits" the Tribes' proposed gaming activities within the meaning of 25 U.S.C. 2710(d)(1)(B), such that the activities could be lawful under IGRA if they were conducted in conformance with a Tribal-State compact. See Pet. 5. The seven Tribes

filed a complaint for a declaratory judgment on that issue. Pet. App. 11. Separate suits were filed by other Tribes, and the suits were consolidated. *Ibid.*

On cross-motions for summary judgment, the district court ruled for the Tribes in part and for the State in part. Pet. App. 28-67. The court rejected the Tribes' argument that "if California permits *any* Class III games to be played, all Class III games should be negotiable in a Tribal-State Compact." *Id.* at 46 n.16. Instead, the district court adopted a two-part test to determine whether a proposed gaming activity is subject to negotiation. *Id.* at 44. First, if a State permits a proposed game to be played for any purpose by any person, "the plain language of IGRA establishes that the game is the proper subject of a Tribal-State compact." *Ibid.* Second, if the proposed game is not permitted, it is nonetheless a proper subject of bargaining unless the State's "public policy, as determined from the totality of its laws," prohibits the game. *Id.* at 44-45. The district court derived that second part of its test from its reading of *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). See Pet. App. 43-44. *Cabazon* held that Public Law 280, ch. 505, 67 Stat. 588 (as amended, 18 U.S.C. 1162, 28 U.S.C. 1360), authorized specified States to enforce on Indian lands their "'criminal/prohibitory' laws," but not their "'civil/regulatory' laws." 480 U.S. at 209. The Court explained that "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation." *Ibid.* The "shorthand test," this Court observed, "is whether the conduct at issue violates the State's public policy." *Ibid.* The district court in this case concluded that IGRA incorporates the *Cabazon*

distinction between criminal/prohibitory and civil/regulatory statutes, which it understood to require a general inquiry into the State's public policy regarding the proposed game. Pet. App. 43-45.

Applying its two-part test, the district court first held that the Tribes' proposed electronic games were subject to negotiation under the first part of the test. Pet. App. 46-49. The court was of the view that "the State has authorized the State Lottery to operate electronic games virtually identical to the electronic games requested by the Tribes," and on that basis it concluded that IGRA expressly "requires that the use of electronic equipment on the Tribes' lands be held a proper subject for a Tribal-State compact." *Id.* at 48-49.

Turning to the second group of games the Tribes proposed, the district court noted that the State does not permit banking or percentage card games to be played for any purpose by any person. The court therefore held that those games are not subject to negotiation under the first part of the test it had fashioned. Pet. App. 50-51. Turning to the second part of the test, the court did not find a clear public policy against all banked or percentage card games, since California permits many banked and percentage *non*-card games (such as the state lottery and parimutuel wagering on horse racing) and allows card rooms to operate card games on a non-banked and non-percentage basis. *Id.* at 52-54. The court held, however, that banked and percentage card games using traditional casino game themes violate California's public policy against casino gaming. The court discerned that public policy from a constitutional prohibition against casinos, a statutory prohibition precluding the state lottery from operating games with casino themes, and a statutory prohibition precluding card rooms from operating casino card games. *Id.* at 54-55.

The district court was unable to determine whether California has a public policy against banked or percentage card games that do not use traditional casino themes. Pet. App. 55. Faced with that uncertainty, the court concluded that the parties should negotiate their differences concerning those games. *Ibid.*; *id.* at 66.

3. a. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 10-24. The court held that Section 2710(d)(1)(B) establishes an unambiguous test for determining whether a form of gaming is subject to negotiation. *Id.* at 16-17. The court concluded that the key term in Section 2710(d)(1)(B) is "permit," which it found to be unambiguous, meaning "to suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." *Id.* at 17 (quoting *Black's Law Dictionary* 1140 (6th ed. 1990)). Applying that definition, the court held that the State had no duty to negotiate with the Tribes over banked or percentage card games or slot machines other than video lottery terminals, since "California does not allow banked or percentage card gaming" and, "[w]ith the possible exception of video lottery terminals, electronic gaming machines fitting the description of 'slot machines' are prohibited." *Ibid.* (footnote omitted).

The court of appeals did not find it relevant that the State "allows games that share some characteristics with banked and percentage card gaming"—*i.e.*, that the State allows banked and percentage games *other* than card games, and *non*-banked, *non*-percentage card games. Pet. App. 17-18. Nor did the court view it as significant "that the state lottery, if not technically a slot machine, is functionally similar to one." *Id.* at 18. Agreeing with the Eighth Circuit's approach in *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273 (1993), the court held that "IGRA does not require a state to negotiate over one

form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming." Pet. App. 18. Under the statutory text, the court explained, "a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." *Id.* at 19.

The court of appeals rejected the Tribes' reliance on *Mashantucket Pequot Tribe* v. *Connecticut*, 913 F.2d 1024 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991), in which the Second Circuit held that Connecticut was required to negotiate over games of chance because Connecticut permitted charities to operate such games (albeit subject to stringent limitations) during "Las Vegas nights." Pet. App. 22 n.13. The court concluded that the Second Circuit reached the "correct result" in *Mashantucket*, because "IGRA's text plainly requires a state to negotiate with a Tribe over a gaming activity in which the state allows others to engage." *Ibid.* Although the Second Circuit relied on a reference to *Cabazon*'s criminal/prohibitory test in the legislative history of IGRA discussing Class II gaming (see 913 F.2d at 1029-1030), the court below viewed that aspect of the Second Circuit's opinion as unnecessary to support the result in that case. Pet. App. 22 n.13.

Based on its analysis of IGRA's text, the court of appeals "affirm[ed] the district court's judgment that the State need not negotiate over banked or percentage card games with traditional casino themes." Pet. App. 23. The court remanded to the district court "to consider the limited question of whether California permits the operation of slot machines in the form of the state lottery or otherwise." *Ibid.*[2]

---

[2] Following the court of appeals' decision, the California Supreme Court issued its decision in *Western Telcon* v. *California State Lottery*, 13 Cal.4th 475, 917 P.2d 651, 53 Cal. Rptr. 2d 812 (1996). In that case, the California Supreme Court held that a computerized keno game

b. The Tribes' petitions for rehearing and suggestions for rehearing en banc were denied. Pet. App. 4. Judge Canby (joined by Judges Pregerson, Reinhardt, Hawkins, Ferguson and Norris) dissented from the denial of rehearing en banc. *Id.* at 4-10. In Judge Canby's view, the key question of statutory interpretation "is not what Congress meant by 'permits,' but what Congress meant by 'such gaming.' Did it mean the particular game or games in issue, or did it mean the entire category of Class III gaming?" *Id.* at 7-8. Judge Canby concluded that "Congress was dealing categorically, and that a state's duty to bargain is not to be determined game-by-game." *Id.* at 8. Thus, in Judge Canby's view, if a State allows *any* form of Class III gaming, it must negotiate with a Tribe concerning *all* forms of Class III gaming that the Tribe proposes, even forms that are subject to prohibitory state laws. *Id.* at 6-7, 8-9.

## DISCUSSION

The court of appeals correctly held that IGRA does not require states to negotiate over forms of Class III gaming that state law completely prohibits. That holding does not conflict with the decision of any other court of appeals. The court's decision is also interlocutory, and further proceedings on remand may clarify the practical effect of the court's holding or even assist the parties in reaching compacts that are satisfactory to the Tribes. The petition for a writ of certiorari should therefore be denied.

1. Under 25 U.S.C. 2710(d)(1)(B), "Class III gaming activities shall be lawful on Indian lands only if such

---

operated by the state lottery was not lawful, because computerized keno is a banked game, and the State Lottery Act does not authorize banked games. The California Supreme Court did not reach the question whether the Lottery Act permits the operation (in the form of a state lottery) of machines that would otherwise fall within the state statutory prohibition of slot machines.

activities are * * * located in a State that permits such gaming for any purpose by any person, organization or entity." As the court of appeals concluded, that statutory text makes it unlawful for Tribes to operate forms of Class III gaming that state law completely prohibits. A State therefore has no duty to negotiate with respect to those forms of gaming. That has been the consistent position of the United States.[3]

a. The term "permit" can have more than one meaning: It can mean "to expressly assent or agree to the doing of an act," or it can mean "to acquiesce, by failure to prevent." Pet. App. 17 (quoting *Black's Law Dictionary* at 1140); see also note 7, *infra*. The term "permit," however, is unambiguous with respect to the question presented in this case. Under any definition of "permit," when a State completely prohibits a form of gaming, it does not permit it.

---

[3] See 96-2162 Gov't C.A. Br. at 11-32, *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir. 1997), petition for cert. pending, No. 96-1617 (filed Apr. 10, 1997); 90-7508 U.S. Amicus Br. at 27 n.14, *Mashantucket Pequot Tribe* v. *Connecticut*, 913 F.2d 1024 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991); see also 90-871 U.S. Amicus Br. at Pet. Stage at 11-15, *Connecticut* v. *Mashantucket Pequot Tribe*, cert. denied, 499 U.S. 975 (1991). The Solicitor of the Interior took a similar position in a legal memorandum for the Assistant Secretary for Indian Affairs, dated April 9, 1991, concerning the procedures adopted by the Secretary under 25 U.S.C. 2710(d)(7)(B)(vii) for gaming to be operated by the Mashantucket Pequot Tribe after the State and the Tribe failed to reach a negotiated compact. The Solicitor stated that in the event that the court-appointed mediator "ch[o]se a compact which permitted a type of gaming which was not allowed by that State 'for *any* person, organization, or entity' under 25 U.S.C. §2710(d)(1)(B)," "[t]he Secretary could not establish procedures to implement that type of gaming." Letter from Thomas L. Sansonetti, Solicitor of U.S. Dep't of Interior, to Ass't Secretary for Indian Affairs 6 (Apr. 19, 1991). The Solicitor's memorandum was made available to the public in connection with the Secretary's adoption of procedures for gaming by the Mashantucket Pequot Tribe (see 56 Fed. Reg. 15,746 (1991)), and we have lodged a copy of that memorandum with the Clerk of this Court.

In dissenting from the denial of rehearing en banc, Judge Canby did not dispute that the term "permits" is unambiguous with respect to the question presented in this case. He asserted, however, that the term "such gaming" is ambiguous: According to Judge Canby, it could either refer to the entire category of Class III games, so that if a State permits one form of Class III gaming, it would have to negotiate over all forms of Class III gaming; or it could refer to the specific forms of gaming at issue, so that if a State completely prohibits the specific forms of Class III gaming that a Tribe seeks to operate, it would have no duty to bargain with respect to those games. Pet. App. 7-8. On closer inspection, the supposed ambiguity dissolves.

Section 2710(d)(1) makes it lawful for a Tribe to operate "Class III gaming activities" only if "such activities" are (1) "authorized by [a Tribal] ordinance" that is "approved by the Chairman"; (2) located in a State that permits "such gaming" for any purpose by any person, organization or entity, and (3) "conducted in conformance with a Tribal-State compact." 25 U.S.C. 2710(d)(1). The key phrase "such gaming" in the second requirement necessarily refers back to "Class III gaming activities" in the introductory clause, and that clause applies to all three requirements. In context, the "Class III gaming activities" that are "authorized by an ordinance" and "conducted in conformance with a Tribal-State compact" can only be the forms of gaming that the Tribe seeks to operate; it cannot refer to the entire category of Class III games. Because "such gaming" in the second requirement refers to the same activities, it also necessarily refers to the forms of Class III gaming that the Tribe seeks to operate and not to the entire category of Class III games. By contrast, if Congress had wanted to formulate the standard described by Judge Canby, it could have provided that Class III

activities are lawful when such activities are "located in a State that permits *any Class III gaming activity* for any purpose, by any person, organization, or entity." Congress, however, did not adopt that categorical approach.

Moreover, the background of IGRA shows that Congress sought through the compacting process to accommodate "significant governmental interests" of the States. S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988). Yet, under Judge Canby's categorical approach, a State would be required, as a matter of federal law, to negotiate with Indian Tribes concerning forms of gaming that the State's own criminal laws completely bar, simply because the State permits some *other* form of Class III gaming. For example, any State that conducts a lottery would have a federal statutory duty to negotiate with Tribes concerning casino gambling and slot machines, even if the State's laws completely outlaw the latter forms of gaming. Nothing in Section 2710(d)(1)(B) suggests that Congress intended that sort of displacement of the significant governmental interests of the States which Congress chose to respect when it enacted IGRA's compacting process for Class III gaming. To the contrary, it imposes a negotiating obligation concerning only "such gaming" as the State "permits."[4]

At the same time, IGRA's compacting process affords reciprocal protection for the significant governmental interests of Tribes by requiring the States to negotiate over a form of Class III gaming as long as the State permits it "for any purpose by any person." That provision enables a Tribe to negotiate terms and conditions

---

[4] The legislative history of IGRA also indicates that Congress sought, through the compacting process, to afford the parties an opportunity "to make use of existing State regulatory systems." S. Rep. No. 446, *supra*, at 13. Congress would not have expected state regulatory systems to be available for the regulation of forms of gaming that the State completely prohibits.

different (and more favorable) than those applicable to non-Indian gaming operators under state law for any Class III gaming activities that the State, after weighing its own public policies, has not seen fit to outlaw entirely. The IGRA compacting process thus deliberately affords a Tribe the potential for attaining a considerable competitive advantage with respect to any form of gaming that the State has not foreclosed.

b. Petitioners err in contending (Pet. 11-12) that IGRA calls for an independent inquiry into the State's "public policy" with respect to gaming that the State completely prohibits. The text of IGRA supplies its own test of whether a Tribe's proposed gaming activity violates a State's public policy: If a State permits the operation of a form of gaming "for any purpose by any person, organization or entity," 25 U.S.C. 2710(d)(1)(B), a Tribe's operation of that form of gaming does not violate the State's public policy in the relevant (statutory) sense, and the State must negotiate over that form of gaming. If, by contrast, a State prohibits a form of gaming to all persons for all purposes, a Tribe's operation of that form of gaming *would* violate the State's public policy in the relevant sense, and the State would have no duty to negotiate with respect to that form of gaming.

Petitioners' reliance on *Cabazon*, *supra*, in support of their proposal for a more general "public policy test" under IGRA is misplaced. See Pet. 12, 13, 14, 17, 23; Reply Br. 4, 6, 7. In *Cabazon*, the Court made passing reference to "whether the conduct at issue violates the State's public policy" (480 U.S. at 209) only as a "shorthand" for the actual test it had announced in the immediately preceding sentence (*ibid.*):

> if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally

> permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.

Applying that terminology of *Cabazon* to this case, the clear intent of California law concerning the operation of banked and percentage card games and non-lottery slot machines "is generally to prohibit [that] conduct." Those state laws therefore would unquestionably have been regarded as criminal/prohibitory under *Cabazon* prior to IGRA's replacement of Public Law 280 as the federal law governing what Indian gaming is lawful in California. And continuing with the *Cabazon* terminology quoted above, just as California law does not "generally permit[] the conduct [of banked and percentage card games and non-lottery slot machines], subject to regulation," those card games and slot machines, if conducted by California Tribes, would not be located in a State that "permits such gaming for any purpose by any person" within the meaning of IGRA.

In short, nothing in either *Cabazon* or IGRA suggests that if a court concludes that a form of gaming is completely prohibited by state law, the court should nevertheless engage in a further and independent inquiry into whether that form of gaming is consistent with the State's "public policy" in a more general sense, in order to determine whether such gaming is a mandatory subject of negotiation for the State. Again, *Cabazon*'s reference to "public policy" was simply a "shorthand" description of the determination of whether the state law is criminal/prohibitory; if it is, that is the end of the inquiry. Where the State has a complete criminal prohibition against a

certain form of gaming, that prohibition *is* the State's public policy.[5]

c. Once a State permits a form of gaming for any purpose by any person, Section 2710(d)(1)(B) does not require a Tribe to comply with a State's entire regulatory scheme for that form of gaming. The text and legislative history of IGRA make clear that a State must negotiate with a Tribe concerning the regulatory system that will apply on Indian lands to forms of gaming that the State permits. 25 U.S.C. 2710(d)(3)(C) (listing as subjects of negotiation the enforcement of regulatory laws, the division of regulatory responsibility between the Tribe and the State, and the standards for the operation of an activity); S. Rep. No. 446, *supra*, at 14 (subjects of negotiation include "days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility").

A State may not avoid its statutory duty to negotiate over the regulation of forms of gaming that it permits by recharacterizing a regulatory law as a prohibition on a distinct form of gaming that is defined by the limitations the State imposes for regulatory purposes. For example, a

---

[5] This Court pointed out in *Cabazon* that the particular state law at issue there (Cal. Penal Code Ann. § 326.5 (West Supp. 1987)) "does not entirely prohibit the playing of bingo," but rather "permits" it subject to certain conditions. 480 U.S. at 205. The Court nevertheless noted that "an argument of some weight may be made that the bingo statute is prohibitory rather than regulatory," but it ultimately accepted the court of appeals' determination that California's bingo statute was civil/regulatory in character for purposes of analysis under Public Law 280. *Id.* at 209-210. The Court noted, by way of contrast, that "certain enumerated gambling games are prohibited under Cal. Penal Code Ann. § 330 (West Supp. 1987)." 480 U.S. at 210. There was no suggestion that with respect to *those* games, some further "public policy" inquiry would have been necessary to determine whether the statutory provisions outlawing them were "criminal/prohibitory" under the framework the Court adopted.

State that permits certain card games, but limits the wagers on those games, may not avoid its duty to bargain over wagering limits on the card games by recharacterizing its regulatory law as a complete prohibition on the form of gaming known as "high stakes card games." Once a State permits card games of a certain type, it has a duty to negotiate over the wagering limits for those games.

In some circumstances, a question may arise concerning whether a state law prohibits a distinct form of gaming or instead regulates the manner in which a permitted form of gaming may be played. Several hypothetical examples may illustrate the point. If state law prohibits five-card stud poker but permits seven-card draw poker (or prohibits parimutuel wagering on dog racing but not on horse racing), a question could arise as to whether that state law prohibits a distinct form of gaming known as "five-card stud poker" (or "dog racing"), or instead regulates the manner in which the permitted form of gaming known as "poker" (or "animal racing") may be conducted. If characterized in the former way, the State would have to negotiate concerning only seven-card draw poker (or horse racing); if characterized in the latter way, the State would have to negotiate over all poker games (or all animal racing). The relevant question in such a case would be whether, in light of traditional understandings and the text and legislative history of IGRA, the State has reasonably characterized the relevant state laws as completely prohibiting a distinct form of gaming.[6] If the State has not reasonably so characterized its laws, it would have a duty to negotiate with respect to the gaming.

This case, however, raises no question as to whether the relevant state laws merely regulate permitted forms of

---

[6] In close cases, it may be relevant as well to examine the purposes behind the state laws that, for example, permit five-card stud poker but not seven-card draw poker.

gaming or instead completely prohibit distinct forms of gaming.[7] The state laws at issue here absolutely prohibit banked and percentage card games and non-lottery slot machines, and California could reasonably treat those as distinct forms of gaming for purposes of framing its criminal prohibitions. See 25 U.S.C. 2703(7)(B) (excluding banked card games and slot machines from Class II gaming); 25 C.F.R. 502.4 (treating as distinct forms of gaming banked card games, banked casino games, slot machines as defined in 15 U.S.C. 1171(a)(1), electronic facsimiles of games of chance, sports betting, parimutuel wagering, and lotteries). Because California does not "permit[] such gaming for any purpose by any person," the court of appeals correctly held that California has no duty to negotiate over banked or percentage card games or non-lottery slot machines.

2. a. Petitioners contend (Pet. 14) that the decision below conflicts with the Second Circuit's decision in *Mashantucket*, *supra*. There is, however, no such conflict.

In *Mashantucket*, the Tribe sought to operate casino games that the State of Connecticut permitted charitable organizations to operate on "Las Vegas nights," albeit subject to stringent regulatory limitations. 913 F.2d at 1026 & n.5. The district court ordered the State to negotiate with the Tribe for the purpose of forming a compact governing the conduct of the same types of games on tribal lands, *id.* at 1026-1027, and the Second Circuit affirmed, *id.* at 1033. The Second Circuit rejected the State's contention that, under Section 2710(d)(1)(B), the Tribe could operate casino games only if it agreed "to the

---

[7] This case likewise does not involve a situation in which state law neither expressly prohibits nor expressly authorizes the gaming at issue. In that situation, it would similarly be necessary to determine whether state law "permits" such gaming within the meaning of 25 U.S.C. 2710(d)(1)(B).

entire state corpus of laws and regulations governing such gaming," *id.* at 1030-1031, including "the status of the sponsoring organization, size of wagers, character of prizes, and frequency of operations," *id.* at 1029. The Second Circuit reasoned that, because Connecticut allows charitable organizations to operate the specified casino games on Las Vegas nights, it "permits" such gaming within the meaning of Section 2710(d)(1)(B) and must negotiate with the Tribe on how those games may be conducted on Indians lands. *Id.* at 1029-1032. There is no inconsistency between the Second Circuit's holding that a State must negotiate concerning forms of gaming its laws permit, albeit subject to extensive regulation, and the Ninth Circuit's holding in this case that a State need not negotiate with respect to forms of gaming that its laws completely prohibit. To the contrary, the Ninth Circuit in this case expressly approved the result reached by the Second Circuit in *Mashantucket*. Pet. App. 22 n.13.

Petitioners contend (Pet. 13-14) that there is nonetheless a conflict, because the Second Circuit relied on the reference in IGRA's legislative history to *Cabazon*'s criminal/prohibitory test. See 913 F.2d at 1029-1030. The Second Circuit, however, ultimately rested its conclusion on the text of 2170(d)(1)(B).[8] Moreover, while the Second Circuit looked to *Cabazon*'s criminal/prohibitory test as illuminating IGRA's statutory test of whether a State "permits" (for any purpose by any person) the forms of gaming that a Tribe proposes, it did not suggest that where, as here, that gaming *is* prohibited under that criminal/prohibitory test, a court nevertheless should engage in a further, independent inquiry into the State's "public policy" concerning that gaming. Accordingly,

---

[8] See 913 F.2d at 1031-1032 (rejecting Connecticut's reliance on cases discussing the *Cabazon* test on the ground that they did not involve IGRA's specific statutory text).

nothing in the Second Circuit's *Mashantucket* decision suggests that it viewed the *Cabazon* test to require a State to negotiate over forms of Class III gaming its laws absolutely prohibit, simply because the State permits other Class III games. There is therefore no reason to believe that the Second Circuit would disagree with the Ninth Circuit's holding in this case that California need not negotiate over banked and percentage card games or non-lottery slot machines, which are absolutely barred by state law.

b. Petitioners similarly err in asserting (Pet. 15-16) a conflict between the decision below and the Tenth Circuit's decision in *Ponca Tribe of Oklahoma* v. *Oklahoma*, 37 F.3d 1422 (1994). This Court vacated and remanded *Ponca Tribe* for further consideration in light of *Seminole Tribe*. 116 S. Ct. 1410 (1996).

In any event, the statement in *Ponca Tribe* relied upon by petitioners does not conflict with the decision in this case. In rejecting a Tenth Amendment challenge to IGRA, the Tenth Circuit stated:

> IGRA permits the states to negotiate tribal-state compacts in accordance with the views of the local electorate. If a state has a policy prohibiting all Class III gaming, then Indian Class III gaming is also automatically prohibited. 25 U.S.C. § 2710(d)(1)(B). If it has any other less restrictive policy or preference regarding Class III gaming in particular, or Class III gaming on Indian lands specifically, nothing in IGRA requires the *state* to surrender or compromise those policies or preferences in attempting to negotiate a compact with the Indian tribe.

37 F.3d at 1434. Petitioners apparently believe that this passage means that a State which permits one form of Class III gaming must negotiate over all forms of Class III gaming. If anything, however, the passage suggests the

opposite. Moreover, the Tenth Circuit had previously held in *Citizen Band Potawatomi Indian Tribe* v. *Green*, 995 F.2d 179, 181 (1993), that a compact may not authorize gaming devices that are forbidden by state law.

Petitioners' assertion (Pet. 17) that there is a conflict between the decision below and the Eighth Circuit's decision in *United States* v. *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (1990), is also incorrect. In that case, the Eighth Circuit held that a Tribe could operate a form of Class II gaming permitted by the State, without complying with all the State's regulatory requirements for that game. *Id.* at 365-368. Interpreting language relating to Class II gaming that is similar to that at issue here, the court concluded that Congress "intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity." *Id.* at 365. That reasoning is fully consistent with the form-specific analysis adopted by the court of appeals in this case.

The Eighth Circuit subsequently adopted a form-specific analysis for Class III games in *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273 (1993). There, the court held that the State did not have an obligation to negotiate over traditional keno simply because the State permitted video keno. *Id.* at 278-279. The court reasoned that "[t]he 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit." *Id.* at 279. There is therefore no conflict between the Eighth and Ninth Circuits concerning the meaning of Section 2710(d)(1)(B).

3. Finally, because the court of appeals remanded to the district court to consider "whether California permits the operation of slot machines in the form of the state

lottery or otherwise" (Pet. App. 23), the decision below is interlocutory. This Court ordinarily declines to review interlocutory decisions, *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari), and there is no reason to depart from that general practice here. The district court's resolution of the question whether the State permits slot machines in the form of a lottery will help to clarify the practical consequences of the court of appeals' decision in this case. Moreover, once the district court resolves that issue, it could set the stage for a new round of negotiations that could result in a compact that is satisfactory to all parties.

Indeed, the State is already engaged in negotiations with another Tribe concerning electronic lottery games. Memorandum of Nine Respondent Indian Tribes at 3-4. If those negotiations are successful, it could result in a model compact that will be satisfactory to all of the Tribes.[9]

---

[9] Contrary to the suggestion of the respondent Tribes, there is no occasion for the Court to delay its disposition of the certiorari petition pending the current negotiations. Those negotiations cannot definitively resolve the question whether gaming the Tribes propose is "permitted" by state law. IGRA's requirements that a Class III gaming activity be conducted pursuant to a Tribal-State compact *and* be located in a State that "permits such gaming for any purpose by any person" are independent prerequisites to lawful Class III gaming. A compact would address only the former requirement; this case addresses the latter. Of course, if a State enters into a compact allowing a particular form of gaming, that action by the State would presumably reflect its determination that that gaming *is* permitted by the State. And in some instances, a negotiated compact might change state law (*e.g.*, if it is enacted by the state legislature, or if the Governor has been delegated the necessary authority under state law), so that gaming that theretofore had been prohibited would become permitted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
*Acting Solicitor General*
LOIS J. SCHIFFER
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
IRVING L. GORNSTEIN
*Assistant to the Solicitor General*
EDWARD J. SHAWAKER
M. ALICE THURSTON
*Attorneys*

JUNE 1997